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3362  
No. 20298

IN THE

**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

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JOHN P. BUCK, Trustee, etc.,

*Appellant,*

*vs.*

OSCO SIMPSON, SR.,

*Appellee.*

---

**APPELLANT'S OPENING BRIEF.**

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QUITTNER, STUTMAN, TREISTER &  
GLATT,

By J. RONALD TROST,

639 South Spring Street,  
Los Angeles, Calif. 90014,

*Attorneys for Appellant.*

**FILED**  
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*vs.*

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*Appellee.*

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## APPELLANT'S OPENING BRIEF.

---

### Jurisdiction.

This is an appeal from an order of the District Court dismissing contempt proceedings initiated against Osco Simpson, Sr. [1 Tr. 39]<sup>1</sup> for failure to comply with an order of the Referee in Bankruptcy directing him to turnover \$72,747.89 to appellant [1 Tr. 16]. On June 21, 1965, appellant filed a timely notice of appeal [1 Tr. 41]. The Court has jurisdiction of this appeal under section 24a of the Bankruptcy Act, 11 U.S.C. §47a.

### Statement of the Case.

On September 9, 1964, while insolvent, Osco Simpson, Sr. ("appellee") sold his residence in Tuscaloosa, Alabama and received \$72,747.89 in cash [1 Tr. 11] in small bills [1 Tr. 12]. Within a week, Simpson and his wife moved from Tuscaloosa, Alabama to Los Angeles.

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<sup>1</sup>The transcript of the record in this court is in two volumes. References to the first volume are cited as "1 Tr."; references to the second volume are cited as "2 Tr."



California [1 Tr. 12] without leaving any forwarding address [Ex. 4, p. 45].<sup>2</sup> On October 2, 1964, an involuntary petition in bankruptcy was filed in Alabama against Simpson, his two sons, and the three partnerships of which they were co-partners [1 Tr. 12]. John P. Buck ("appellant") was appointed receiver of each of the estates [1 Tr. 12-13]. On October 6, 1964, appellant took physical possession of those assets of the estates remaining in Alabama, but did not find any portion of the \$72,747.89 [1 Tr. 13]. When Simpson was located in California, ancillary receivers of Simpson's estate were appointed by the United States District Court for the Southern District of California [1 Tr. 13]. On October 21, 1964 the ancillary receivers filed an application in the bankruptcy court to compel Simpson to turnover the \$72,747.89 to them [1 Tr. 13-14]. Simpson filed an answer to the application in which he denied having possession of the money [1 Tr. 7] and on November 16 and 17, 1964, a trial on the application was held before the Referee in Bankruptcy [1 Tr. 16].

Simpson defended on the ground that he no longer was in possession of the funds. His written answer to the application admitted possession of the money in early September but alleged that the money was left in his office in Alabama when he and his wife moved to California [1 Tr. 7]. In support of this allegation Simpson testified that the money was deposited by him in a sack in an unlocked filing cabinet in his office in

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<sup>2</sup>The reporter's transcript of the proceedings before the Referee in Bankruptcy was received in evidence as Exhibits 3 and 4 by the District Judge at the contempt hearing on May 25, 1965 [2 Tr. 57-58]. The reporter's transcript of November 16, 1964 is hereinafter referred to as "Exhibit 3"; the reporter's transcript of November 17, 1965 is hereinafter referred to as "Exhibit 4".

Tuscaloosa, Alabama; that he told no one, including his wife and sons, where the money was placed; and that, as far as he knew, the money was still there [1 Tr. 14]. Appellant, then receiver and now trustee of Simpson's estate, testified that he searched the office and filing cabinet on October 6, 1964 and again on October 9, 1964, but found no trace of the money [1 Tr. 14-15].

The Referee in Bankruptcy gave no credence to Simpson's defense and granted the turnover order. In his oral opinion following two days of trial, the Referee concluded that "there is not one scintilla of doubt . . . that Mr. and Mrs. Simpson, on the date they departed from Alabama, had, in their possession, custody and control \$72,747.89" [Ex. 4, p. 77]. The Referee characterized Simpson's testimony as "an explanation of the handling of this money which would not be plausible and explainable and acceptable by a child" [Ex. 4, p. 76]. After making his findings of fact and conclusions of law, the Referee entered his order compelling Simpson to turnover the funds to appellant [1 Tr. 16]. No petition for review or other appeal was taken from that order and it became final on December 12, 1964 [1 Tr. 25].

Appellant promptly initiated contempt proceedings when Simpson failed to comply with the turnover order. An order to show cause why appellee should not be held in contempt was issued and was returnable before the District Court [1 Tr. 22]. Although personally served, appellee did not make a personal appearance at the hearing before the District Judge on January 29, 1965, but was represented by counsel [2 Tr. 3]. The District Judge held Simpson in contempt for failure to comply with the turnover order [1 Tr. 35] and issued a bench warrant for his arrest [2 Tr. 11-12].

Pronouncement of judgment under the District Court's contempt order was set for February 8, 1965 at 10:00 A.M. [2 Tr. 16]. Appellant's counsel had a conflict in his court calendar and made arrangements with the District Judge's clerk to have sentencing delayed until counsel arrived [Affidavit in support of appellant's Petition for Writ of Prohibition and Mandate, on file with this Court in Case No. 19895]. Nevertheless, the matter was called "out of order" [2 Tr. 16] although the court was advised that appellant's counsel "was on his way" [2 Tr. 16]. After inquiring what Simpson was "going to do about payment of the fine", the District Judge, on the basis of the report "that Mr. Simpson stated he didn't have any money" [2 Tr. 17], set aside the contempt order stating: "The attorney doesn't have enough interest to be here on time or notify us. So I will discharge him of contempt" [2 Tr. 17, 1 Tr. 36].

Pursuant to appellant's petition for prohibition and mandate, this Court, on April 12, 1965, reversed both the District Judge's order holding appellee in contempt and the order discharging appellee from contempt, and remanded the cause to the District Court [1 Tr. 37].

The remanded cause was set for hearing by the District Court on May 5, 1965 [2 Tr. 21]. Appellant, in support of the contempt order, introduced into evidence the Referee's findings of fact and turnover order, and rested [2 Tr. 21-22]. Simpson's counsel reported that Simpson was not present in court but that he relied on the same explanation made before the Referee "that the monies were in a file in his place of business back in Alabama and . . . he has no personal ability to pay"



[2 Tr. 23], and that “the whole case simply turns on whether or not the court believes [Simpson’s] testimony” [2 Tr. 24]. Appellee introduced no evidence and the court took the matter “under submission . . . [to] write a memorandum ” [2 Tr. 34]. Five days later, the court *sua sponte* set the matter down for further hearing on May 25, 1965 [1 Tr. 38].

Osco Simpson took the stand at the continued contempt hearing and repeated the testimony given before the Referee. After denying possession of or control over any portion of the \$72,000 [2 Tr. 38] Simpson, over appellant’s objection, was permitted to testify concerning factual issues decided by the Referee because the court was “more or less trying the matter over again here” [2 Tr. 41]. Simpson testified, as he had before, that he put the sack containing \$72,000 in his business office in Alabama shortly before leaving for California and had not seen or heard of the money since [2 Tr. 41-53]. Appellant cross-examined Simpson, introduced into evidence the transcripts of the testimony before the Referee [2 Tr. 58], and the court took the matter under submission [2 Tr. 65].

On May 27, 1965 the District Judge entered his written order adjudging Osco Simpson not in contempt of court because he was presently unable to comply with the turnover order [1 Tr. 39]. This appeal followed.

### **Specification of Error.**

The District Court erred in not holding appellee in civil contempt for failure to comply with the Referee in Bankruptcy’s turnover order and in not committing appellee until he purged himself of contempt.

### Summary of Argument.

The turnover proceedings before the Referee in Bankruptcy resulted in findings of fact and a final order that were not subject to collateral attack in the contempt proceedings. Turnover proceedings are an integral part of bankruptcy administration and they are enforceable through the District Judge's civil contempt powers. The turnover proceeding is separate and distinct from the contempt proceeding, and when concluded by a final order, the turnover order is *res judicata* and cannot be collaterally attacked in the contempt proceeding. A final turnover order was entered, it prevented appellee from relitigating his explanation of the disappearance of the money, and the District Court erred in receiving such testimony into evidence in the contempt proceeding.

The District Court's finding that appellee could not comply with the turnover order at the time of the contempt proceeding was clearly erroneous. The District Court's finding was based on appellee's defense that the money was left in Alabama when he moved to California. This explanation had been offered once and rejected by the Referee, a finding clearly commanded by the evidence. The Referee's findings were *res judicata* and appellee's testimony was inadmissible. The District Judge obviously based his finding of "present inability to comply" on his belief in appellee's explanation. The District Court's order was thus based wholly upon a finding as to appellee's credibility which in turn was founded on inadmissible evidence. The finding was clearly erroneous and should be reversed.

## ARGUMENT.

### I.

**The Referee's Findings of Fact That Appellee Had \$72,000 in His Possession at the Time of the Turnover Proceeding Were Res Judicata and Could Not Be Collaterally Attacked in the Contempt Proceeding.**

Judicially fashioned, the turnover proceeding has become an integral part of bankruptcy administration. Vested with title to all of the bankrupt's assets as of the date of the filing of the petition in bankruptcy, 11 U.S.C. §110a, the trustee has the statutory duty to collect that property for the benefit of the estate. 11 U.S.C. §75a. To prevent recalcitrant bankrupts from thwarting the trustee's collection of assets, the "courts of bankruptcy have fashioned the summary turnover procedure as one necessary to accomplish their function of administration". *Maggio v. Zeitz*, 333 U.S. 56, 62-63 (1948).

If disobeyed, civil contempt powers are conferred upon the courts of bankruptcy to enforce the turnover orders. Two separate provisions of the Bankruptcy Act authorize such proceedings. Section 2a(13) empowers any court of bankruptcy to "enforce obedience by persons to all lawful orders, by fine or imprisonment or fine and imprisonment". 11 U.S.C. §11a(13). This section creates the civil powers to coerce obedience to the bankruptcy court's orders. *Maggio v. Zeitz*, *supra*, 333 U.S. at 67. A second provision of the Bankruptcy Act, Section 41b, empowers the district judge to conduct a summary proceeding concerning any alleged disobedience to the referee's order and to commit the contemner if the facts so warrant. 11 U.S.C. §69b.

The contempt proceeding is separate and distinct from the turnover proceeding. The sole purpose of the contempt proceeding is to coerce obedience to the turnover order. The decisive character of civil contempt is incarceration for enforcement purposes, and it leaves the contemner to carry the keys of the prison in his own pocket. *Penfield Co. of California v. Securities & Exch. Com'n*, 330 U.S. 585 (1947).

Thus, when the turnover proceeding is concluded by a final order, "it becomes *res judicata* and not subject to collateral attack in the contempt proceedings." *Maggio v. Zeitz*, *supra*, 333 U.S. at 68; *Oriel v. Russell*, 278 U.S. 358 (1929). The district judge cannot permit the contemner to subvert the contempt proceeding into a "reconsideration of the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy." *Maggio v. Zeitz*, *supra*, 333 U.S. at 69. The courts have cautioned that every effort should be made to issue turnover orders "only when it appears that obedience is within the power of the party being coerced by the order. *But when it has become final, disobedience cannot be justified by re-trying the issues as to whether the order should have issued in the first place* [emphasis added]." *Maggio v. Zeitz*, *supra*, 333 U.S. at 69. This rule is well settled. See, 2 *Collier on Bankruptcy* (14th ed.) ¶23.10 [4], p. 581.

There is no question but that the Referee's findings in the turnover proceeding were *res judicata* and could not be collaterally attacked in the contempt proceeding. The Referee's findings of fact, conclusions of law and turnover order were entered December 2, 1964 [1 Tr. 10]. *No petition for review or other appeal was*



*taken from that order* [1 Tr. 25] and it became final ten days later. 11 U.S.C. §67c.

Conclusively established by that proceeding were two facts: Simpson, contrary to his contention, had possession of the money at the time of the turnover proceeding; and, contrary to Simpson's contention, he did not leave the money in a filing cabinet in his office in Alabama. Each of these facts were at issue in the turnover proceeding. Appellant's application for an order compelling Simpson to turnover the funds alleged that the cash was still in his possession or control [1 Tr. 5]. Simpson's answer admitted "that in the early part of September 1964 he did have possession of a sack of money believed by him to be approximately \$72,000", but alleged that Simpson "put said money in a file in an office at 1016 Bridge Avenue, Northport [sic], Alabama" and that he "has no present knowledge of whether or not the money is still located in Alabama" [1 Tr. 7]. Appellant's evidence established that although Simpson received \$72,747.89 in cash in twenty, ten and five dollar bills on September 9, 1964 [1 Tr. 12], he had refused to turnover the money to his receivers in bankruptcy [1 Tr. 14]. Admitting receipt of the money [Ex. 3, p. 14], Simpson defended by simply stating that he put the money in a filing cabinet in his office in Northport, Alabama shortly before leaving for Los Angeles [Ex. 3, pp. 17-19], that he did not know the present whereabouts of the money sack [Ex. 3, p. 35], and that he would be able to produce the money if it still was in the file [Ex. 3, p. 38]. The Referee branded Simpson's explanation as one that would not be accepted by a child [Ex. 4, p. 76] and found that Simpson had possession or control of the money [1 Tr. 14-15]. Accordingly, the Referee entered his order compelling

Simpson to turnover the money to appellant [1 Tr. 16].

Contrary to *Maggio's* clear command that the findings of fact in the turnover proceeding are *res judicata* and "cannot be relitigated or corrected in a subsequent contempt proceeding", *Maggio v. Zeitz, supra*, 333 U.S. at 70, the contempt proceeding resulted in a re-trial of the very issues that were the subject of the turnover proceeding. After appellant introduced into evidence the Referee's findings of fact and turnover order [2 Tr. 21-22], the District Judge permitted Simpson to testify, over appellant's objections [2 Tr. 41, 46], that he put the \$72,000 in a filing cabinet in Alabama before leaving for California [2 Tr. 41-42] and that he had never seen the money again [2 Tr. 44]. This was the same excuse propounded before the Referee in Bankruptcy but which the Referee refused to believe. Although appellant's objections referred the Court to *Maggio v. Zeitz, supra*, the evidence was admitted "to find out where the money went" even though the District Judge "realize[d] that ruling isn't in the law books" [2 Tr. 46]. The District Court's trial *de novo* of Simpson's defense to the turnover application was clear error.

## II.

**The District Court's Finding That Appellee Was Unable to Comply With the Referee's Turnover Order Was Clearly Erroneous and Should Be Reversed.**

Unlike this Court's scope of review in most matters, appeals from proceedings or controversies in bankruptcy extend to both the law and the facts. With respect to orders of a court of bankruptcy, Section 24a of the Bankruptcy Act charges the appellate courts with the

duty "to review, affirm, revise, or reverse, both in matters of law and in matters of fact", except for judgments rendered on a jury verdict. 11 U.S.C. §47a. It is clear that a civil contempt proceeding is a proceeding or controversy within the meaning of Section 24 making both matters of law and matters of fact reviewable. 2 *Collier on Bankruptcy* (14th ed.) ¶ 24.22, p. 751. Because of Section 24, the applicability of the "clearly erroneous" test of Rule 52(a) of the Federal Rules of Civil Procedure to bankruptcy appeals is disputed. 2 *Collier on Bankruptcy* (14 Ed.) ¶ 25.30, pp. 973-974.

Whether the "clearly erroneous" test or some other test is applied, findings "dependent upon oral testimony where the candor and credibility of witnesses would best be judged" are entitled to great weight on appeal. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). The test is generally whether "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed". *United States v. United States Gypsum Co.*, *supra*, 333 U.S. at 395. The crux of the inquiry was succinctly stated by Judge Learned Hand in *United States v. Aluminum Co. of America*, 148 F. 2d 416, 433 (2d Cir. 1945):

"It is idle to try to define the meaning of the phrase 'clearly erroneous'; all that can be profitably said is that an appellate court, though it will hesitate less to reverse the finding of a judge than that of an administrative tribunal or of a jury, will nevertheless reverse it most reluctantly and only when well persuaded."

And in being "well persuaded", the courts have rarely set aside findings based upon demeanor testimony where

credibility is involved. *Grace Bros. v. Commissioner of Internal Revenue*, 173 F. 2d 170, 174 (9th Cir. 1949); 5 *Moore's Federal Practice* (2d ed.) ¶52.03[1], p. 2615. These same principles are applicable to the findings of a referee in bankruptcy. *Costello v. Fasio*, 256 F. 2d 903, 908 (9th Cir. 1958); *In re Gordon & Gelberg*, 69 F. 2d 81 (2d Cir. 1934); 2 *Collier on Bankruptcy* (14th ed.) ¶39.28, p. 1518.

When an appeal results from a district court's order setting aside the findings of a referee in bankruptcy, it is the referee's findings, and not those of the district court, that are before the appellate court. *The Morris Plan Industrial Bank v. Henderson*, 131 F. 2d 975 (2d Cir. 1942). Even though the reviewing judge makes findings on review expressly contrary to those of the referee, the judge's findings are not before the appellate court. *Hoppe v. Rittenhouse*, 279 F. 2d 3 (9th Cir. 1960); *The Morris Plan Industrial Bank v. Henderson, supra* (2d Cir. 1942); *Phillips v. Baker*, 165 F. 2d 578 (5th Cir. 1948); *In re Lurie Bros., Inc.*, 267 F. 2d 33 (7th Cir. 1959); *O'Ricley v. Endicott-Johnson Corporation*, 297 F. 2d 1 (8th Cir. 1958); *Potucek v. Cordeleria Lourdes*, 310 F. 2d 527 (10th Cir. 1962).

Had Osco Simpson directly attacked the turnover order he would have had the burden of overturning the Referee's findings of fact. He would have had to establish with this Court a "firm conviction that a mistake had been committed". *United States v. United States Gypsum Co., supra*, 333 U.S. at 395, by the Referee when he found that Simpson had the money all the time and that Simpson fabricated his tale of the money in the unlocked filing cabinet.



Simpson could have directed this Court to nothing more in the record than his own protestations that he did not have the money when he left Alabama. His defense was simple. He sold his home, he stated, to pay off two or three federal tax liens [Ex. 3, p. 31]. After cashing the buyer's check for \$72,747, and while alone, he put the money in a filing cabinet in his office in Northport, Alabama [Ex. 3, p. 31]. Within a week, he and his wife left for California because "we didn't have any work, and I thought I would just come out here and rest up a while, and shop around and see how the work was out here, and maybe stay out here quite a while" [Ex. 3, p. 32]. He did not have the money in his possession and did not know its whereabouts, he testified, but he had no objection to appellant taking possession of it [Ex. 3, p. 35]. When asked by his counsel to explain why he put the sack of money in the file in his office, Simpson casually replied): "Well, we sold the home and we didn't have anywhere else, and I thought it would be just as safe to put it there as anywhere else" [Ex. 3, pp. 36-37]. With this testimony, Simpson rested his defense [Ex. 3, p. 38], except for cross-examination of appellant's witnesses.

Appellant, on the other hand, would have directed this Court to the overwhelming evidence that led the Referee to reject Simpson's defense. Simpson and his two sons were partners in the Simpson Plastering Company, the Northport Building Supply, and the Stardust Supper Club. In addition, Simpson owned outright the Bridge Avenue Package Store [Ex. 4, pp. 19-20]. Each of the partnerships and Simpson himself maintained regular checking accounts in Tuscaloosa banks [Ex. 4, pp. 4-14]. The partnerships and Simpson became in-

solvent [Ex. 4, pp. 23-24] and Simpson decided to sell his house, for which he was asking about \$200,000 [Ex. 4, p. 36]. After turning down an offer of \$200,000, from which he would have received \$40,000 to \$50,000 cash and the balance of his equity over a five to ten year period [Ex. 4, p. 38], Simpson accepted an offer \$75,000 below his asking price and \$75,000 below the previous offer [Ex. 4, p. 37]. He took about \$72,000 in cash for his equity of \$150,000 [Ex. 4, p. 40] because he wanted an all cash sale [Ex. 4, pp. 43-44]. When he received the check for the purchase price on September 9, 1964, Simpson immediately took it to a Tuscaloosa, Alabama bank, refused a cashiers check in exchange [Ex. 3, p. 5], demanded that he be paid in cash, and walked out of the bank with \$72,747 in five, ten and twenty dollar bills [Ex. 3, p. 5].

September 9, 1964 was the last day any portion of the \$72,747 was seen by anyone other than Simpson. Appellant, on October 6, 1964, took possession of all of the Simpsons' property, including the filing cabinet where the money was supposed to be, but did not then or thereafter find the money [Ex. 3, pp. 45-46].

Called to the witness stand by appellant's counsel, Simpson "traced" the course of the missing money from the time he left the bank until the date of trial. Conveniently Simpson's testimony could never be contradicted by direct evidence. Simpson testified he took the money home and a couple of days later removed it to his office [Ex. 3, pp. 17-19]. No one was with him, he testified, when he moved the money to the office [Ex. 3, p. 73] and he told no one, including his wife and sons, where he had placed the money

[Ex. 3, p. 29]. That was the last Simpson allegedly knew of the money. Within a few days Simpson and his wife surreptitiously moved to California leaving no forwarding address [Ex. 4, p. 45]. Although Simpson telephoned his sons in Alabama after arriving in California, he did not ask them to check on the money [Ex. 4, p. 47]. Simpson's two sons themselves moved to California in October, driving two new automobiles [Ex. 4, pp. 50-54]. They were assisted, appellee's wife testified, by \$2,900 cash that she deposited in a California bank on her arrival here but which she withdrew and mailed in cash to the sons [Ex. 4, pp. 59-62].

No reasonable man could have become "well persuaded" by this record that the Referee had made a mistake in finding Simpson had the money at the time of the turnover proceeding. The issue would have been essentially as framed by the Referee at the conclusion of the trial [Ex. 4, p. 75]:

"The question is this: is it plausible that a man with a bank account and with his experience, who has had such extensive banking experience and business experience and who was so deeply involved as early as June, 1964, has discussed his legal complications and his financial difficulties with lawyers, and where a State Court action has been filed for the appointment of a Receiver, and, on the eve of his departure from Tuscaloosa, Alabama, for Los Angeles, California, would take \$72,000.00 and put it in a sack, and put that sack in a filing cabinet and leave it in Alabama, where he and his wife departed from for the State of California under the harassed circumstances which were prevalent at the time of his departure."

The question could hardly have been resolved in any manner other than as resolved by the Referee [Ex. 4, pp. 76-77]:

“We have here an explanation of the handling of this money which would not be plausible and explainable and acceptable by a child [much less] a mature man—a person who has practiced law for thirty-five years before going on the bench, and being on the bench approximately ten years, and who is familiar with human nature and who has had a chance to see and hear and listen and observe the testimony and demeanor and the conduct of Mr. and Mrs. Simpson. There is not one scintilla of doubt in this Court’s mind that Mr. and Mrs. Simpson, on the date that they departed from Alabama, had, in their possession, custody and control, \$72,747.89.”

The Referee’s findings of fact and the turnover order certainly would have been affirmed.

But the validity of the Referee’s findings and turnover order are not the issues before this Court. At issue is the validity of the District Court’s order discharging the contempt proceeding based upon his finding of May 27, 1965 that Osco Simpson “is presently unable to comply” with the turnover order [2 Tr. 39].<sup>3</sup> It is this finding which is now before the Court, and it is this finding which appellant claims is clearly erroneous.

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<sup>3</sup>The District Court did not make the special findings of fact contemplated by Rule 52(a) of the Federal Rules of Civil Procedure. Although failure to make such findings may constitute error, the cause need not be remanded if a full understanding of the question presented may be had without the aid of separate findings. *Shellman v. Shellman*, 95 F. 2d 108 (D.C. Cir. 1938). See, 5 *Moore’s Federal Practice* (2d ed.), ¶52.06 [2], p. 2663.



And the District Court's finding of "present inability to comply", tested by any standard, should be reversed. Further inquiry into the credibility of Simpson's explanation that he left the money in Alabama was foreclosed by *Maggio*, and any evidence in support of this defense was inadmissible. This explanation had been offered once, rejected and could not be collaterally attacked. *In re Lawrence Carpet Co.*, 122 F. Supp. 912 (S.D. N.Y. 1954). Support for the District Court's finding must then come from the other evidence offered by Simpson. But aside from testimony as to his present earning capacity and standard of living [2 Tr. 38-40], and his statement that if he now had the money he would turn it over to the court [2 Tr. 45], Simpson offered no other evidence [2 Tr. 40-45]. Little weight could have been given such testimony. *In re Sussman*, 85 F. Supp. 570 (S.D. N.Y. 1949).<sup>4</sup> See, *Sahn v. Pagano*, 302 F. 2d 629 (2d Cir. 1962). The District Court's finding undoubtedly was based upon his belief in Simpson's

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<sup>4</sup>In granting the trustee's application to enforce the referee's order by civil contempt, the court in *In re Sussman*, 85 F. Supp. 570 (S.D. N.Y. 1949), commented on the weight to be given such evidence [85 F. Supp. at 572]:

"Even assuming as true the bankrupt's story as to his very modest manner of living and of his borrowings and other methods of obtaining money in order to support himself and his wife for the year 1947, still I cannot accept that defense here as a full and complete exculpation. I must consider all the evidence. I cannot leave out of my mind the judicial determination that three or four months before October 28, 1947 bankrupt had in his possession and control the sum of \$23,000 of the assets of the estate. The time element here is quite important.

"His explanation of his inability to turn over the money is not sufficient. Of course, it is natural to presume that any one who evidences no indicia of affluence is not possessed of it. But it is also natural that one who must have known that he would be called upon to explain the loss or disappearance of a substantial sum of money would not likely exhibit signs of affluence."

explanation that he left the money in the filing cabinet in Alabama, and nothing else. This was Simpson's sole defense at both the February 8th [2 Tr. 17] and May 5th contempt hearings [2 Tr. 23], and it was the only "evidence" the District Judge relied upon when he vacated his contempt order on February 8th. The order dismissing the contempt proceeding was "based wholly on the finding as to [a party's] credibility which in turn was founded on consideration of inadmissible evidence", and must be reversed. *Smallfield v. Home Insurance Company of New York*, 244 F. 2d 337 (9th Cir. 1957).

### Conclusion.

For the foregoing reasons, the order of the District Court adjudging appellee not in contempt of court should be reversed and appellee should be committed until such time as he purges himself of contempt.

Respectfully submitted,

QUITTNER, STUTMAN, TREISTER &  
GLATT,

By J. RONALD TROST,

*Attorneys for Appellant.*

### **Certificate.**

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. RONALD TROST





## APPENDIX.

### Identification of Exhibits as Required by Rule 18(f) of the Rules of the United States Court of Ap- peal—Ninth Circuit.

<u>Exhibit No.</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>
1	2 Tr. 21	2 Tr. 21	2 Tr. 22
2	2 Tr. 21	2 Tr. 21	2 Tr. 22
3	2 Tr. 57	2 Tr. 57	2 Tr. 58
4	2 Tr. 57	2 Tr. 57	2 Tr. 58
Exhibits introduced			
in trial before			
Referee	2 Tr. 58-59	2 Tr. 58	2 Tr. 59
		(by Reference)	



No. 20298  
IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

---

JOHN P. BUCK, Trustee, etc.,

*Appellant,*

*vs.*

OSCO SIMPSON, SR.,

*Appellee.*

---

**APPELLEE'S BRIEF.**

---

GEORGE A. WILLSON,

3400 Florence Avenue,  
Huntington Park, Calif. 90257,

*Attorney for Appellee.*

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No. 20298

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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JOHN P. BUCK, Trustee, etc.,

*Appellant,*

*vs.*

OSCO SIMPSON, SR.,

*Appellee.*

---

## APPELLEE'S BRIEF.

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### Summary of Argument.

The appellant challenges "the validity of the District Court's order discharging the contempt proceeding based on his finding of May 27, 1965, that Osco Simpson 'is presently unable to comply' with the turnover order. [2 Tr. 39]." See page 16 of Appellant's Opening Brief.

- A. Did the District Court have the legal authority to reach a conclusion different from the order of the Referee?
- B. Did the District Court so abuse its discretion as to warrant reversal?

Appellee respectfully urges application of the well established rule that "The Trial Court's findings may not be rejected if they can be supported by any rational view of the evidence . . ." *Smallfield v. Home Insurance Company of New York*, 244 F. 2d 337 (By this Court in 1957).

## ARGUMENT.

### I.

Appellant's assignment of error is that the District Court did not have sufficient evidence upon which to make an order discharging the contempt proceeding based upon his finding of May 27, 1965 that "Osco Simpson is presently unable to comply with the turnover order". At least two classifications of evidence were adduced in the District Court. That evidence which appellant urges was in the nature of a collateral attack upon the Referee's findings and order and that evidence which ran to the court's inquiry of whether Osco Simpson was presently able to comply with the turnover order.

A. The District Court had the legal authority to reach a conclusion different from the order of the Referee based on evidence other than that which was excluded by the rule prohibiting collateral attack, Title 11 of the Bankruptcy Act, Section 69, Paragraph B. It is well settled that the bankrupt may be punished for contempt in failing to comply with an order requiring a turnover to his trustee of assets of the estate which are in his possession and under his control provided that he have the present ability to do so. *In re: McCormick*, 97 Fed 566. In a civil contempt proceeding against a bankrupt to coerce obedience to a turnover order, the bankrupt, confronted by the turnover order, established by prior possession at a time when continuance thereof was a reasonable inference, is confronted by a *prima facie* case which he can successfully meet only with a showing of present inability to comply and the *fact that he cannot challenge the previous adjudication of possession does not prevent him from establishing a lack of*

*present possession. Maggio v. Zeitz* (1948), 68 S. Ct. 401, 333 U.S. 56, 92 L. Ed. 476.

B. Did the District Court abuse its discretion so as to warrant reversal?

### **Admissible Evidence.**

The Referee's findings and turnover order was made December 2, 1964 [1 Tr. 16], becoming final December 12, 1964 [1 Tr. 25]. The discharge order of the District Court discharging the contempt proceeding was May 25, 1965 [2 Tr. 39] showing a lapse of time of nearly six months.

The bankrupt and appellee herein on May 25, 1965 took the witness stand under oath and testified upon the following points [2 Tr. 38-40]:

1. Unequivocal denial of the present possession of \$72,000 or any portion thereof.
2. Denial of any means or control of \$72,000 or any portion thereof.
3. Denial that anyone was holding any sums of money for the bankrupt.
4. A present denial of the ability to comply with the turnover order.
5. Statements revealing the bankrupt's occupation as a contractor and plasterer; that bankrupt was recently employed as a plasterer and was a union worker earning \$4.87½ an hour; that his present address was 3315 Norton Avenue, Lynwood, California, at which he paid \$75 a month rent; that his wife resided with him and that the bankrupt did not own an automobile nor stocks nor bonds nor real estate. On page 45, the bank-

rupt further stated that if he had possession of the money, he would turn it over to the Court. That he had no motivation or reason of any kind why he would not turn the money over to the Court if he had it, and on page 60 [2 Tr. 60] the bankrupt recited further that his age was 56, that he went to around the 7th or 8th grade in school, had no other kind of formal education, and was born in Northport, Alabama.

In this hearing, the District Court further had the opportunity to view the demeanor and appearance of the bankrupt and to determine the weight to be given to his creditability and veracity.

## II.

Appellant argues that the District Court's finding of present inability to comply was "undoubtedly based on the District Court's belief and the bankrupt's explanation that he had made before the Referee," *i.e.*, entirely upon evidence constituting a collateral attack upon the Referee's finding.

There was no finding by the District Court to substantiate the appellant's contention that the Court rested its discharge order solely upon evidence constituting a collateral attack upon the Referee's findings.

The appellee therefore urges the well established rule that: "The Trial Court's findings may not be rejected if they can be supported by any rational view of the evidence . . ." *Smallfield v. Home Insurance Company of New York*, 224 F. 2d 337 (By this Court in 1957). Furthermore, it should be noted that even though appellant objected to the admission of evidence in the cate-



gory of a collateral attack upon the Referee's findings and order, that nevertheless, appellant proceeded to cross-examine the bankrupt upon the same material and subject matter to which he had objected and again it was the appellant who, though he objected to such evidence, introduced the Reporter's Transcript of the proceedings before the Referee [2 Tr. p. 57], and said Reporter's Transcripts were received in evidence and marked as Exhibits 3 and 4 [2 Tr. 58], at his request.

The appellee respectfully suggests that the alleged objectionable evidence be considered as mere surplusage and not in any way prejudicial to the District Court's exercise of its discretion to act upon the other evidence hereinabove recited in reaching its decision.

### Conclusion.

For the foregoing reason, the order of the District Court adjudging appellee not in contempt of court should be sustained and the appellee discharged from said contempt proceeding.

Respectfully submitted,

GEORGE A. WILLSON,  
*Attorney for Appellee.*



### **Certificate.**

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

GEORGE A. WILLSON



Nos. 20,293, 20,295

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

UNITED STATES OF AMERICA, *Appellant,*

VS.

D. I. OPERATING Co., a Nevada Corporation,  
*Appellee.*

UNITED STATES OF AMERICA, *Appellant,*

VS.

UNITED RESORT HOTELS, INC., a Delaware Corporation, as successor to UNITED HOTELS CORPORATION, a dissolved Delaware Corporation, as successor to WILBUR CLARK'S DESERT INN Co., a dissolved Nevada Corporation,  
*Appellee.*

UNITED STATES OF AMERICA, *Appellant,*

VS.

DESERT INN OPERATING COMPANY, a Nevada Corporation,  
*Appellee.*

**On Appeals from the Judgment of the United States  
District Court for the District of Nevada**

**BRIEF FOR THE APPELLANT**

**RICHARD M. ROBERTS,**

Acting Assistant Attorney General

**MEYER ROTHWACKS,**

**JEROME FINK,**

Attorneys,

Department of Justice,

Washington, D. C. 20530

*Attorneys for Appellant.*

*Of Counsel:*

**JOHN W. BONNER,**

United States Attorney

FILED

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U. S. DISTRICT COURT  
DISTRICT OF NEVADA





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Nos. 20,293-20,295

IN THE

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UNITED STATES OF AMERICA,	<i>Appellant,</i>
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D. I. OPERATING Co., a Nevada Corporation,	<i>Appellee.</i>
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UNITED STATES OF AMERICA,	<i>Appellant,</i>
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UNITED RESORT HOTELS, INC., a Delaware Corporation, as successor to UNITED HOTELS CORPORATION, a dissolved Delaware Corporation, as successor to WILBUR CLARK'S DESERT INN Co., a dissolved Nevada Corporation,	<i>Appellee.</i>
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UNITED STATES OF AMERICA,	<i>Appellant,</i>
VS.	

DESERT INN OPERATING COMPANY, a Nevada Corporation,	<i>Appellee.</i>
---	------------------

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On Appeals from the Judgment of the United States  
District Court for the District of Nevada

## BRIEF FOR THE APPELLANT

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### OPINION BELOW

The opinion of the court below is reported at 239  
F. Supp. 78.

## **JURISDICTION**

These three cases, consolidated for trial and on appeal, involve actions by the three corporate plaintiffs to recover \$163,310.87 alleged to have been overpaid in wagering taxes for the period April, 1953, through April, 1959. These taxes were paid in August, 1957, June, 1958, and April, 1959 (I-R. 46-47); and timely claims for refund were thereafter filed. Within the time provided in Section 3772 of the Internal Revenue Code of 1939 and Section 6532 of the Internal Revenue Code of 1954, on March 10, 1960, these actions were brought in the District Court for recovery of the taxes paid. (I-R. 1-8, 12-15, 18-22.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346. The trial court's memorandum opinion was filed on January 4, 1965. (I-R. 28-40.) Findings of fact and conclusions of law and judgment were entered on March 24, 1965. (I-R. 41-50.) Within sixty days thereafter, on May 21, 1965, notices of appeal were filed. (I-R. 51-53.) Jurisdiction is vested in this Court by 28 U.S.C., Section 1291.

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## **QUESTIONS PRESENTED**

1. Whether the trial court erred in holding that taxpayers were not subject to the wagering tax on proceeds of a wagering pool conducted by them in conjunction with a professional golf tournament; and in declaring invalid Treasury Regulations on Wagering Tax, Section 44.4421-(c)(4), providing that a wagering pool "operated with the expectancy of a



profit in the form of increased sales, increased attendance, or other indirect benefits is conducted for profit for purposes of the wagering tax.”

2. Whether the trial court erred in finding and concluding that taxpayers had not realized a direct pecuniary benefit from this wagering pool, that is, a share of the pool itself.

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### STATUTES AND REGULATIONS INVOLVED

These are set forth in Appendix A, *infra*.

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### STATEMENT

The three corporate appellees at various times during the period involved managed and operated Wilbur Clark's Desert Inn, a well-known resort hotel and gambling casino in Las Vegas, Nevada.<sup>1</sup> (I-R. 42-43.)

Beginning in April, 1953, the Desert Inn conducted on its golf course a professional golf tournament, known as the "Tournament of Champions." In conjunction with this Tournament, and as a part of it, the Desert Inn also conducted a wagering pool, commonly called a Calcutta. (I-R. 43-44.)

This pool was conducted in the following manner: On the night preceding opening of the Tournament, a dinner was held in the Painted Desert Room of the Inn, with a large group of persons, including a select

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<sup>1</sup>For convenience, further reference will be to "Desert Inn", the "Inn" or to "taxpayers".

group of newsmen, being admitted. (II-R. 44.) With various celebrities serving as auctioneers, golfers entered in the Tournament were auctioned off. The name of the successful bidder, and the amount bid, were written on a blackboard after the name of the player who had been purchased. This blackboard was prominently displayed during the course of the Tournament. (II-R. 26-27.) At the conclusion of the Tournament, the gross amount in the pool, minus ten percent, was distributed to the winning bidders. The gross amounts in the pool during the years in issue were (I-R. 29):

1953	\$ 93,250
1954	137,850
1955	202,500
1956	129,000
1957	265,650
1958	266,000
1959	380,000

The Calcutta was held in conjunction with the first tournament conducted by the Desert Inn. The Calcutta had been objected to by the Desert Inn's golf professional who had conceived the format for the Tournament of Champions, but the officials of the Inn nonetheless determined to hold it. They also determined to obtain the sponsorship of a charitable organization. (II-R. 13-18.)

It was decided to approach the Damon Runyon Fund for Cancer Research (hereinafter called the Damon Runyon Fund or the Fund), a tax-exempt

organization, well-known to members of the sports and entertainment world (II-R. 27), for purposes of obtaining the sponsorship of that organization. Contacting Mr. Walter Winchell, prominent newspaperman, and Mr. Teeter, the executive assistant of the Damon Runyon Fund, taxpayers' officers first offered the Fund ten percent of the total amount bid in the pool in return for use of the Fund's name. This proved not to be acceptable, and finally taxpayers orally agreed to pay the Fund \$35,000 a year, or ten percent of the pool, whichever was greater. At the time this agreement was entered into, it was assumed by taxpayers' officers that ten percent of the pool would fall substantially short of the minimum guarantee of \$35,000 a year, but taxpayers deemed it "worthwhile" to put in the "extra money." (II-R. 18-20, 27-29.) Taxpayers' purpose in agreeing to pay \$35,000 a year for use of the Fund's name was business, not charity; or, as the court below stated: "The pool was not operated for charity."<sup>2</sup> (I-R. 33.)

After the agreement to pay \$35,000 had been made, the golf Tournament was widely advertised and publicized as sponsored by the Damon Runyon Memorial Fund. (II-R. 25, 74, 86.) Extensive publicity was also given to contributions by the Desert Inn or, as it was

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<sup>2</sup>This statement was amply justified by the evidence which, among other things, showed that the Inn's contributions to the Fund in 1952, the year before the \$35,000 agreement, amounted to only \$672. (II-R. 31.) Moreover, the evidence disclosed that the Inn had successfully contended to the Revenue Service that the \$35,000 payment was deductible for income tax purposes as an ordinary and necessary business expense rather than subject to the limitations on charitable contributions. (II-R. 87-90.)

sometimes stated, by Wilbur Clark to the Damon Runyon Fund. (II-R. 72-73, 76-77.)

The Desert Inn paid the guaranteed \$35,000 by checks to the Damon Runyon Fund transmitted before the Tournament and Calcutta were held. In most years, these payments were made several months prior to the Tournament. (II-R. 47-48.) On its books of account, the Desert Inn established an account in which it entered all items of income and expenses pertinent to the over-all operation of the Tournament, including the Calcutta. The \$35,000 payment to the Fund was recorded as an expense; the ten percent share of the pool which the Inn retained was recorded as an income item under the label "Share of Calcutta Auction." (II-R. 51-53.) Expenses of the Tournament exceeded the income from it and the excess was deducted on taxpayers' income tax returns as advertising, promotion and publicity business expenses. (II-R. 55.)

Taxpayers did not dispute that the Desert Inn benefited from the conduct in the Calcutta in the following ways: (1) increased gambling receipts at the Desert Inn casino from the persons invited to the Calcutta auction; (2) increased sales of food and drink by the Desert Inn to those persons invited to the Calcutta auction; (3) increased attendance at the Tournament of Champions where admission charges were made and refreshments sold; and (4) increased gambling and other hotel profits at the Desert Inn, both during the period of the Tournament and throughout the year as a result of publicity and advertising. (I-R. 26-27.)

### **SPECIFICATION OF ERRORS RELIED UPON**

The District Court erred in finding and concluding that taxpayers were not subject to the wagering tax on the proceeds of a wagering pool conducted by them in conjunction with a professional golf tournament and erred in holding invalid Treasury Regulations providing that a wagering pool "operated with the expectancy of a profit in the form of increased sales, increased attendance, or other indirect benefits is conducted for profit for purposes of the wagering tax." The trial court further erred in finding and concluding that taxpayers had not derived a direct profit from this wagering pool, that is, a ten percent share of the pool which taxpayers used to help defray one of their ordinary and necessary business expenses.

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### **SUMMARY OF ARGUMENT**

The wagering tax statutes impose a tax on wagering pools "conducted for profit." The statutory language and its underlying legislative history show that Congress intended to tax all commercialized gambling, whether the profits be directly or indirectly realized, and intended to exclude from the wagering tax provisions only friendly or social pools without commercial implications. Even assuming, *arguendo*, that there is some ambiguity as to whether the statute intended to cover pools conducted for indirect as well as direct profits, Treasury Regulations defining the statutory phrase "conducted for profit" to cover indirect profits are, at the least, a permissible and reasonable con-

struction of the statute. The District Court erred, therefore, in holding that the statute did not tax wagering pools conducted for indirect pecuniary benefit and erred in declaring the Treasury Regulations invalid.

Even if it be assumed that the statute requires, for taxability, a pool conducted for a direct pecuniary benefit, that is, a share of the pool itself, taxpayers in this case realized such a benefit. The taxpayers had agreed to pay to a charitable organization, for the use of its name and with attendant publicity, the sum of \$35,000 a year. This constituted and was treated as a business expense of the taxpayers, not a charitable contribution. Taxpayers kept ten percent of the wagering pool as partial reimbursement for the \$35,000 payment they had already made. Thus, since taxpayers used part of the proceeds of the wagering pool to reimburse themselves for amounts constituting a part of their ordinary and necessary business expenses, the taxpayers realized a direct pecuniary benefit from their wagering pool to the extent of this reimbursement.



## ARGUMENT

## I

THE INCREASED PROFITS OF THE DESERT INN RESULTING  
FROM THE CALCUTTA SUBJECTS THIS POOL TO THE  
WAGERING TAX AND THE DISTRICT COURT ERRED IN  
DECLARING INVALID TREASURY REGULATIONS SO  
PROVIDING

The Desert Inn, a commercial enterprise, for business purposes conducted a golf tournament and, as an integral part, conducted a wagering pool or Calcutta. The Calcutta was a gambling operation of magnitude, with gross receipts rising in the last year involved to nearly four hundred thousand dollars. Ten percent of this wagering pool was retained by the Desert Inn as partial reimbursement for a business, not a charity, payment to the Damon Runyon Fund, whose name was widely publicized as the sponsor of the golf tournament. The Desert Inn admittedly reaped financial benefit from the Calcutta in the form of increased gambling and other hotel profits both during the period of the Tournament and thereafter. Nonetheless the trial court held that the Calcutta had not been "conducted for profit" within the meaning of Section 3285 of the Internal Revenue Code of 1939 and Section 4421(1)(B) of the Internal Revenue Code of 1954, Appendix A, *infra*. The trial court also declared invalid Treasury Regulations on Wagering Tax, Section 44.4421-1(c)(4), Appendix A, *infra*, which provides:

Sec. 44.4421-1 *Definitions.*

\* \* \* \*

(c) *Other terms used—*

\* \* \* \*

(4) *Conducted for profit.* A wagering pool or lottery may be conducted for profit even though a direct profit will not inure from the operation thereof. A wagering pool or lottery operated with the expectancy of a profit in the form of increased sales, increased attendance, or other indirect benefits is conducted for profit for purposes of the wagering tax.

This decision, we submit, misconceived the statutory intention; but, at the very least, it disregarded the well-settled principle that, while Treasury Regulations may not contravene a statute, they may adopt a construction falling within its permissible limits.

The trial court's decision proceeded from the premise that the term "conducted for profit" clearly and unambiguously required a showing of a direct pecuniary benefit, that is, a share of the pool itself.<sup>3</sup> This premise is unsound.

The term "profit" does not, either as a matter of dictionary definition or in the statutory context, require either "a net profit" or a "direct profit"; but rather, on its face connotes all forms of pecuniary advantage or gain.

In the recent case of *Chappell & Co. v. Middletown Farmers Market & Auction Co.*, 334 F. 2d 303 (C.A. 3d), the court was confronted with a quite similar problem, a construction of the term "public perform-

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<sup>3</sup>In the second part of this argument, we will demonstrate that the Desert Inn did take a share of the pool; but we will assume, for purposes of argument at this point, that it did not.

ance for profit" within the meaning of the copyright laws. There the appellee, a shopping center, piped recorded, copyrighted music into the center for the entertainment of its customers. Answering the contention that this did not constitute a "performance for profit," the court stated (p. 306):

The atmosphere created by the playing of recordings made shopping at the Mart more pleasurable and attractive to the patrons. Though this was not of direct pecuniary benefit, it was "for profit" to the degree that it was commercially beneficial to the Mart to have an attractive shopping atmosphere. It is against the "commercial, as distinguished for a purely philanthropic public use of another's composition" that the statute is directed. *Remick & Co. v. American Automobile Accessories Co.*, 5 F. 2d 411 (6 Cir. 1925.) See *Herbert v. Shanley*, 242 U.S. 591, 594-595, 37 S. Ct. 232, 61 L. Ed. 511 (1917). So long as there can be discerned a "material, tangible, commercial profit" in the rendition of musical compositions, it is for profit within Section 1(e). See Conference Rep. No. 2470, 82 Cong. 2d Sess. (1952); U. S. Code Cong. & Adm. News, 1952, p. 2310. See *M. Witmark & Sons v. L. Bamberger & Co.*, 291 F. 776 (D.N.J. 1923).

Both the statutory language and structure and the underlying legislative history make clear that Congress, using the term "conducted for profit" in the wagering tax statutes, similarly intended only to distinguish the wagering pool with a commercial purpose from a friendly or social one. Nowhere did Congress suggest that a lottery conducted for commercial rea-

sons and profit, whether the profit be direct or indirect, fell outside the scope of the tax.

The excise tax on wagers was introduced into the Internal Revenue Code by the Revenue Act of 1951. Its stated purpose was to have "commercialized gambling," without regard to its "legality or illegality" under state law, help meet the "need for increased revenue, especially at a time when many consumer items of a seminecessity nature are being called upon to bear new or additional tax burdens." H. Rep. No. 586, 82d Cong., 1st Sess., p. 55 (1951-2 Cum. Bull. 357, 397); S. Rep. No 781, 82d Cong., 1st Sess., p. 113 (1951-2 Cum. Bull. 458, 539).

The statute confined the tax to those wagers on sports events placed with a person engaged in the business of accepting such wagers. "The purpose of this requirement is to exclude from the tax the purely 'social' or 'friendly' type of bet." H. Rep. No. 586, *supra*, p. 55-56 (1951-2 Cum. Bull. 357, 397); S. Rep. No. 781, *supra*, p. 113-114 (1951-2 Cum. Bull. 458, 540). Similarly, a wagering pool with respect to a sports event is taxable if the pool is conducted for profit. "The requirement that the pool be operated for profit is designed to eliminate from the tax base those pools which are occasionally organized among friends or other associates, all of the contributions being distributed to the winner or winners." H. Rep. No. 586, *supra*, p. 56 (1951-2 Cum. Bull. 357, 398); S. Rep. No. 781, *supra*, p. 114 (1951-2 Cum. Bull. 458, 540).

The pool which was before the lower court was hardly a "friendly" office type pool, nor one in which "all" the wagers were returned to the participants. It was a widely publicized pool involving large sums, operated in conjunction with, and admittedly in profitable support of, a commercial enterprise. In treating the term "conducted for profit" to require, clearly and unambiguously, that the operator of the pool take a share of the gross receipts of the pool itself, the trial court has, we submit, too narrowly read the term "profit" and has, consequently, defeated Congressional intention.

In reaching its result, however, the lower court has not only misread statutory language and accompanying legislative history. It has read the statute to be so clear and unambiguous as even to prevent a construction treating the term "profit" as including both direct and indirect profit; for the District Court has struck down as invalid Treasury Regulations on Wagering Tax, Section 44.4421-1(c)(4), which so define the term.

While, of course, Treasury Regulations may not contravene a statute, it is equally well settled that Regulations promulgated by the agency charged with enforcing the law are to be given great weight and should not be overruled unless plainly inconsistent with the statute. *Commissioner v. South Texas Co.*, 333 U.S. 496, 501; *Fawcus Machine Co. v. United States*, 282 U.S. 375, 378; *Brewster v. Gage*, 280 U.S. 327, 336; and if a statute be deemed ambiguous, Regu-



lations construing it are both permissible and entitled to great weight. As the Court stated in *Koshland v. Helvering*, 298 U.S. 441, 446:

Where the act uses ambiguous terms, or if of doubtful construction, a clarifying regulation or one indicating the method of its application to specific cases not only is permissible but is to be given great weight by the courts.

The Regulations struck down by the District Court are not only, we submit, a permissible and reasonable construction of the statute, which is all that is required, but they are far more in accord with the Congressional language and purpose than the restrictive interpretation successfully urged upon the court below by taxpayers.<sup>4</sup>

The District Court sought support for its holding in the 1941 case of *Deshler Hotel Co. v. Busey*, 36 F. Supp. 392 (S.D. Ohio), affirmed 130 F. 2d 187 (C.A. 6th) (I-R 38), involving the construction of an earlier version of the so-called cabaret tax statutes. The statute involved there shows the inappropriateness of the attempted analogy. The cabaret tax statute (Section 500(a)(5) of the Revenue Act of 1926, c. 27, 44 Stat. 9) which was involved in *Deshler* provided for a tax on amounts—

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<sup>4</sup>Similar Regulations were not promulgated under the 1939 Code which governs the years 1953 and 1954. Taxpayers made no point of this below, conceding that, if the Regulation were valid, judgment should be entered against them. (II-R. 13.) In any event, the result for the years 1953 and 1954 should be the same both because the permissible construction of the statute is the correct one and also for the reasons which will be set forth in the second portion of this argument.

paid for admission to any public performance for profit at any roof garden, cabaret, or other similar entertainment, to which the charge for admission is wholly or in part included in the price paid for refreshment, service or merchandise; \* \* \*.

Thus, under that statute, it was required that there be some charge for admission to the hotel dining room or that one be included in the prices charged for food or service. The trial court found that no charge for admission was made and that food prices were not increased and concluded the tax did not apply. The Court of Appeals, one judge dissenting, affirmed. It is true that the District Court, in addition to finding that there was no admission charge, indulged in dictum to the effect that the performance was not for profit since the music itself was a part of overhead and could not have been provided for a direct profit. This was not only unnecessary since the court had found no admission was charged, but it was contrary to the Supreme Court decision in *Herbert v. Shanley Co.*, 242 U.S. 591. In that case, the Court held that there had been a copyright infringement through a "public performance for profit" within the meaning of the copyright statutes even though the infringing hotel did not charge admission or increase its food prices. Through Justice Holmes, the Court said (p. 595):

If music did not pay it would be given up. If it pays it pays out of the public's pocket. Whether it pays or not the purpose of employing it is *profit* and that is enough. (*Italics added.*)



In any event, the Court of Appeals in the *Deshler Hotel Co.* case affirmed without mention of the dictum below<sup>5</sup> because of the finding that there had been no charge for admission included in the prices for refreshment, service or merchandise.

Furthermore Congress amended the cabaret tax provisions in 1942 clearly to eliminate the requirement of an admission charge for imposition of the tax. (For a full development of the early history of the cabaret tax, including the changes made in 1941 and 1942, see *Lethert v. Culbertson's Cafe, Inc.*, 313 F. 2d 506, 509-511 (C.A. 8th).) Hence, since 1942, a performance is deemed to be for profit even where no admission is charged. The purpose of that enactment, as stated by the Senate Finance Committee Report (S. Rep. No. 1631, 77th Cong., 2d Sess., p. 268 (1942-2 Cum. Bull. 504, 700)), was "to allay possible questions under the present statute" and "confirms the Treasury Department's interpretation of the present statute." Assuming, without agreeing, that this represented a change rather than a clarification of existing law, we do not see how it aids the taxpayers here.

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<sup>5</sup>The majority of the Court of Appeals held *Herbert v. Shanley Co.*, *supra*, not pertinent because the applicable Treasury Regulations excluded orchestral music from the definition of public performance for profit for purposes of the cabaret tax. When analogies are sought, however, the statute under consideration in the case at bar is more like that involved in *Shanley* than like that involved in *Deshler* where there was a requirement of a charge or admission in addition to the requirement of a public performance for profit.

The pre-1942 cabaret tax statutes and the litigation involving them had concentrated on the requirement that there be some admission fee or increased charges imposed upon the patrons of the establishment, which requirements were generated by other elements of the statute than the term "public performance for profit." When litigation produced the problems Congress acted promptly to alter the emphasis of the statute from the necessity of admission fees or other increased charges and, as a part of these changes, made clear that the term "performance for profit" was not to be used by courts to restore emphasis on increased charges against the patrons.

Here, however, the wagering statute contains no requirement of admission fees. It simply taxes "wager placed in a wagering pool \* \* \* if such pool is conducted for profit." The term "profit" itself, standing alone, calls for including any form of pecuniary advantage or gain, and there are no other elements of the statute to require that the gain must be a share of the pool itself. Moreover, as stated, the legislative history underlying the statute shows that only the friendly, office-type pool, without commercial implications, was intended to be excluded from coverage.

The District Court also seemed to place some reliance on the fact that the Tournament of Champions (including the Calcutta) showed an excess of expenditures over receipts (I-R. 30, 32); but as Justice Holmes said in *Herbert v. Shanley Co.*, *supra* (p. 595), "Whether it pays or not the purpose of employ-

ing it is profit and that is enough"; and as the court in *Chappell & Co. v. Middletown Farmers Market & Auction Co.*, *supra*, also construing the copyright infringement laws said (p. 306), "Though this was not of direct pecuniary benefit it was 'for profit' to the degree that it was commercially beneficial \* \* \*. It is against the 'commercial,' as distinguished from a purely philanthropic public use of another's composition, 'that the statute is directed'." We submit that the same result was intended by Congress here.

Finally, the trial court "judicially notices" that in many taverns and beer parlors, wagering pools are conducted in conjunction with televised sports events with all proceeds being distributed to the winners and that the Government does not tax this. (I-R. 39-40.) If the court is referring to friendly bets made between customers at a neighborhood tavern or bar, or even a pool with the bartender holding the money but not sanctioned in doing so by the owners of the establishment, then the court is merely referring to the pool among friends or associates which is spoken of in the legislative history. If, however, the court is referring to a pool actually conducted by the owners of the establishment for the purpose of stimulating trade during telecasts of a sporting event, then such pools are deemed taxable by the Revenue Service and any failures to tax them are the result of oversight not design. See Rev. Bul. 54-256, 1954-2 Cum. Bull. 401 (ruling that the operation of a punch-board or wagering board by a merchant on his premises for the purpose of stimulating trade is subject to the wagering

tax even though the merchant gets no portion of the proceeds).

The court below has incorrectly construed the statute and has erroneously struck down Regulations, and we ask that its judgment be reversed. We will now proceed to show that, even if the statute were construed to require a direct pecuniary benefit, that is, a share of the pool itself, the Desert Inn on the facts of this case did realize such a direct pecuniary benefit.

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## II

### **THE DESERT INN REALIZED A DIRECT PROFIT FROM THE POOL SINCE TEN PERCENT OF THE POOL WAS USED TO SATISFY ONE OF THE INN'S BUSINESS EXPENSES**

The Desert Inn, having decided that it wanted a sponsor, agreed to pay \$35,000, or ten percent of the pool if greater, to the Damon Runyon Fund in return for its sponsorship. This was a business decision not an act of charity. Indeed, the Inn successfully contended before the Revenue Service in connection with its income tax returns that this \$35,000 payment was a deductible business expense, not a charitable contribution subject to a limitation on deductibility. The \$35,000 payment had been made to the Fund well in advance of the Tournament, and the Inn retained ten percent of the pool in partial reimbursement of the payment. On this state of facts, the trial court nonetheless rejected as "untenable" the Government's contention that the Inn had realized a direct

pecuniary benefit from the pool in that ten percent of the pool was used to satisfy one of the Inn's business expenses. (I-R. 32.) The court seems, in part, to have rejected the contention because the overall operations of the Tournament (including the Calcutta) produced a loss. (I-R. 32.)

The trial court's error here was to confuse the term "direct profit" with the term "net profit." If a gambler arranged to keep ten percent of a pool as profit, expecting it to cover his expenses, but found he had miscalculated, surely no one would suggest that the pool had not been conducted for profit because the operation showed a deficit. Similarly, if a department store ran a pool and kept ten percent of the pool to help defray the cost of newspaper advertisements for the store, no one should suggest that the pool had not been conducted for profit merely because the advertisements cost more than the ten percent.

But, in substance, this is precisely what occurred in the case at bar. The Desert Inn wanted the sponsorship of the Damon Runyon Fund. It agreed to pay \$35,000 for this, expecting to recoup a portion of this payment from the Calcutta pool.<sup>6</sup> In return the

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<sup>6</sup>In its formal findings the trial court found that the "bidders" in the auction "contributed" to the Fund. (I-R. 44.) If by this, the court meant that the bidders were advised that ten percent would go to the Fund, there is some evidence to support this (II-R. 36-37), although advertising and other publicity referred to the contributions as having been made by the Desert Inn or by Wilbur Clark. However, there can be no dispute that the payment to the Fund was by the Desert Inn, which thereafter retained ten percent of the pool in partial reimbursement.



Damon Runyon Fund permitted the use of its name as sponsor of the Tournament (including the Calcutta), and the Tournament of Champions and the Desert Inn realized substantial publicity, including national television advertising, from this sponsorship.

The District Court made no finding whether the payment was made to have the Fund sponsor the Calcutta or the entire Tournament (including the Calcutta). While taxpayers contended that the sponsorship was for the Calcutta alone, all the objective facts of record are to the contrary—all printed programs, advertising, and other publicity described the Tournament as under the sponsorship of the Fund. (II-R. 24-25, 73, 74-75, 76-79.) In any event, whether the \$35,000 payment was for sponsorship of the Tournament or for sponsorship of the Calcutta, it was a business expense and the Inn was repaid a part of that expense with its ten percent share of the pool.

This, we submit, was as surely a direct pecuniary profit to the Desert Inn from the conduct of the pool, as if the ten percent share had been used to put the putting greens in shape or to pay a part of the electric light bill in the Desert Inn's Painted Desert Room on the night of the Calcutta auction. In short, even if, as we dispute, a pool where all of the receipts are distributed to the participants were deemed to be non-taxable, although operated to stimulate trade, there should be no question that such a pool becomes taxable if the merchant retains part of the money to defray a portion of the expenses of holding the event.

### CONCLUSION

In view of the foregoing, it is asked that the judgment of the court below be reversed and judgment be entered for the United States.

Respectfully submitted,

RICHARD M. ROBERTS,

Acting Assistant Attorney General

MEYER ROTHWACKS,

JEROME FINK,

Attorneys,

Department of Justice,

Washington, D. C. 20530

*Attorneys for Appellant.*

*Of Counsel:*

JOHN W. BONNER,

United States Attorney

October, 1965.

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### CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RICHARD L. CARICO,

Assistant United States Attorney

**(Appendices A and B Follow)**







## Appendix A

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### Internal Revenue Code of 1939:

SEC. 3285 [as added by Sec. 471(a), Revenue Act of 1951, c. 521, 65 Stat. 352]. TAX.

(a) *Wagers*.—There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof.

(b) *Definitions*.—For the purposes of this chapter—

(1) The term “wager” means (A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers, (B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (C) any wager placed in a lottery conducted for profit.

(2) The term “lottery” includes the numbers game, policy, and similar types of wagering. The term does not include (A) any game of a type in which usually (i) the wagers are placed, (ii) the winners are determined, and (iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and (B) any drawing conducted by an organization exempt from tax under section 101, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

(c) *Amount of Wager*.—In determining the amount of any wager for the purposes of this

subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(d) *Persons Liable for Tax.*—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

\* \* \* \*

(26 U.S.C. 1952 ed., Sec. 3285.)

## Internal Revenue Code of 1954:

### SEC. 4401. IMPOSITION OF TAX.

(a) *Wagers.*—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) *Amount of Wager.*—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) *Persons Liable for Tax.*—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person, who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

(26 U.S.C. 1958 ed., Sec. 4401.)

## SEC. 4421. DEFINITIONS.

For purposes of this chapter—

(1) *Wager.*—The term “wager” means—

(A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers,

(B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is for profit, and

(C) any wager placed in a lottery conducted for profit.

(2) *Lottery.*—The term “lottery” includes the numbers game, policy, and similar types of wagering. The term does not include—

(A) any game of a type in which usually

(i) the wagers are placed,

(ii) the winners are determined, and

(iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and

(B) any drawing conducted by an organization exempt from tax under sections 501 and 521,

if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

(26 U.S.C. 1958 ed., Sec. 4221.)

## SEC. 7805. RULES AND REGULATIONS.

(a) *Authorization*.—Except where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, the Secretary or his delegate shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.

\* \* \* \*

(26 U.S.C. 1958 ed., Sec. 7805.)

## SEC. 7851. APPLICABILITY OF REVENUE LAWS.

(a) *General Rules*.—Except as otherwise provided in any section of this title—

\* \* \* \*

(4) *Subtitle D*.—Subtitle D of this title shall take effect on January 1, 1955. Subtitles B and C of the Internal Revenue Code of 1939 (except chapters 7, 9, 15, 26, and 28, subchapter B of chapter 25, and parts VII and VIII of subchapter A of chapter 27 of such code) are hereby repealed effective January 1, 1955. Provisions having the same effect as section 6416(b)(2)(H), and so much of section 4082(c) as refers to special motor fuels, shall be considered to be included in the Internal Revenue Code of 1939

effective as of May 1, 1954. Section 2450(a) of the Internal Revenue Code of 1939 (as amended by the Excise Tax Reduction Act of 1954) applies to the period beginning on April 1, 1954, and ending on December 31, 1954.

\* \* \* \*

(26 U.S.C. 1958 ed., Sec. 7851.)

### Treasury Regulations 132 (1939 Code):

Sec. 325.20 *Effective period.* The tax on wagers imposed by section 3285 is effective with respect to wagers placed on or after November 1, 1951.

Sec. 325.21 *Scope of tax.* (a) Section 3285 imposes a tax on (1) all wagers placed with a person engaged in the business of accepting wagers upon the outcome of a sports event or a contest; (2) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit; and (3) any wager placed in a lottery conducted for profit.

(b) A person is engaged in the business of accepting wagers if he makes it a practice to accept wagers with respect to which he assumes the risk of profit or loss depending upon the outcome of the event or the contest with respect to which the wager is accepted. It is not intended that to be engaged in the business of accepting wagers a person must be either so engaged to the exclusion of all other activities or even primarily so engaged. Thus, for example, an individual may be primarily engaged in business as a salesman, and also for the purpose of the tax be engaged in the business of accepting wagers.



(c) A wagering pool conducted for profit includes any scheme or method for the distribution of prizes to one or more winning bettors based upon the outcome of a sports event or a contest, or a combination or series of such events or contests, provided such wagering pool is managed and conducted for the purpose of making a profit.

(d) A sports event includes every type of sports event, whether amateur, scholastic, or professional, such as horse racing, auto racing, dog racing, boxing and wrestling matches and exhibitions, baseball, football, and basketball games, tennis and golf matches, track meets, etc.

(e) A contest includes any type of contest involving speed, skill, endurance, popularity, politics, strength, appearances, etc., such as a general or primary election, the outcome of a nominating convention, a dance marathon, a log rolling, wood chopping, weight lifting, corn husking, beauty contest, etc.

\* \* \* \*

Treasury Regulations on Wagering Tax (1954 Code):  
Sec. 44.4421-1 *Definitions*.

(a) *Wager*. The term "wager" means—

(1) Any wager placed with a person engaged in the business of accepting wagers upon the outcome of a sports event or a contest;

(2) Any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit; and

(3) Any wager placed in a lottery conducted for profit.

\* \* \* \*

(c) *Other terms used*——

(1) *Wagering pool*. A wagering pool conducted for profit includes any scheme or method for the distribution of prizes to one or more winning bettors based upon the outcome of a sports event or a contest, or a combination or series of such events or contests, provided such wagering pool is managed and conducted for the purpose of making a profit.

\*   \*   \*   \*

(4) *Conducted for profit*. A wagering pool or lottery may be conducted for profit even though a direct profit will not inure from the operation thereof. A wagering pool or lottery operated with the expectancy of a profit in the form of increased sales, increased attendance, or other indirect benefits is conducted for profit for purposes of the wagering tax.

(26 C.F.R., Sec. 44.4421.1.)

## Appendix B

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### EXHIBITS

Plaintiffs'	Identified	Offered	Received
1	II-R. 38	II-R. 38	II-R. 38
2	II-R. 93	II-R. 93	II-R. 93
3	II-R. 93	II-R. 93	II-R. 93
4	II-R. 93	II-R. 95	II-R. 96

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C	II-R. 42-43	II-R. 42-43	II-R. 43
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E	II-R. 63-64	II-R. 64	II-R. 64
F	II-R. 64	II-R. 64	II-R. 64
G	II-R. 64	II-R. 64	II-R. 64
H	II-R. 64	II-R. 64	II-R. 64
I	II-R. 64	II-R. 64	II-R. 64
J	II-R. 64	II-R. 64	II-R. 64
K	II-R. 74	II-R. 74	II-R. 74
L	II-R. 81	II-R. 81	II-R. 81
M	II-R. 82	II-R. 82	II-R. 82
N	II-R. 84	II-R. 84	II-R. 85
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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

D. I. OPERATING CO. , a Nevada  
Corporation,

Appellee.

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UNITED STATES OF AMERICA,

Appellant,

vs.

UNITED RESORT HOTELS, INC. , a  
Delaware Corporation, as successor to  
UNITED HOTELS CORPORATION, a dis-  
solved Delaware Corporation, as successor  
to WILBUR CLARK'S DESERT INN CO. , a  
dissolved Nevada Corporation,

Appellee.

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UNITED STATES OF AMERICA,

Appellant,

vs.

DESERT INN OPERATING COMPANY,  
a Nevada Corporation,

Appellee.

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BRIEF FOR APPELLEES

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## OPINION BELOW

The opinion of the court below is reported at 239 F. Supp. 78.

## JURISDICTION

These three cases, consolidated for trial and on appeal, involve the wagering tax under Section 3285 of the Internal Revenue Code of 1939 and Section 4421 of the Internal Revenue Code of 1954. The three corporate plaintiffs were erroneously assessed, successively, a total of \$163,310.87 as wagering tax from April 1953 to April 1959, inclusive. The taxes were paid on August 1, 1957, June 20, 1958, and April 29, 1959 (I-R. 46-47); and timely claims for refund were thereafter filed. On March 10, 1960, within the time provided by Section 3772 of the Internal Revenue Code of 1939 and Section 6532 of the Internal Revenue Code of 1954, these actions for recovery of tax were brought in the District Court. (I-R. 1-8, 12-15, 18-22.) Jurisdiction was conferred on the District Court by 28 U.S.C. Section 1346. The District Court's memorandum opinion was filed January 4, 1965. (I-R. 28-40). Findings of fact and conclusions of law and judgment were entered on March 24, 1965. (I-R. 41-50.) Within sixty days thereafter, on May 21, 1965, notices of appeal were filed. (I-R. 51-53.) Jurisdiction is vested in this Court by 28 U.S.C. Section 1291.

## QUESTIONS PRESENTED

1. Whether the District Court erred in holding that

(a) The wagering tax statute imposing a tax on a wagering pool "conducted for profit" means conducted for a direct profit from the pool;

(b) Treasury Regulations Section 44.4421-1 (c) (4) is invalid in defining a

wagering pool "conducted for profit" in terms of indirect benefits.

2. Whether the District Court erred in finding that appellees did not realize any direct profit from its wagering pools, 90 per cent of which was distributed to the winning bettors, the remaining 10 per cent distributed as a charitable contribution on behalf of all bettors.

## STATUTES AND REGULATIONS INVOLVED

These are set forth in the Appendix, infra.

## STATEMENT

Wilbur Clark's Desert Inn (hereinafter "Desert Inn") is a well-known hotel in Las Vegas, Nevada. It was managed and operated successively during the period involved by the three corporate appellees. (I-R. 42-43.)

In the early part of 1952, Mr. Howard Capps, the former tournament director of the Professional Golfers Association (hereinafter "PGA"), was employed by Desert Inn in connection with a plan to construct a golf course. (II-R. 14-15.) During Mr. Capps' prior employment as tournament director of PGA he devised a plan for a tournament that had never theretofore been held, which he called a "Tournament of Champions," in which only those professional golfers who had won a major golf tournament during the preceding twelve months would be permitted to participate. (I-R. 15.)

Immediately after Mr. Capps' employment, Desert Inn determined to put Mr. Capps' plan for a Tournament of Champions into effect. Mr. Capps discussed his plan with the PGA directors, all of whom were very enthusiastic. (II-R. 16.)

After Mr. Capps had secured PGA approval of his plan for the tournament from



the PGA directors, Desert Inn decided to hold a Calcutta in connection with the tournament. (II-R. 16.) Customers of Desert Inn requested the Calcutta, and there were rumors also that other hotels were planning a Calcutta in connection with this tournament. (II-R. 17.) Mr. Capps objected strenuously to having a Calcutta in connection with his tournament. (II-R. 17-18.) In order to remove what Mr. Capps considered the stigma of holding a Calcutta in connection with a Tournament of Champions, it was decided that part of the proceeds of the Calcutta be paid to a recognized charity, and the Damon Runyon Memorial Fund for Cancer Research (hereinafter "Damon Runyon Fund" or "Fund") was selected. (II-R. 18, 22.)

In the negotiations with Mr. Walter Winchell and Mr. Teeter, directors of the Fund, Desert Inn first offered 10 per cent of the Calcutta pool. (II-R. 19.) But Mr. Winchell wanted a guaranteed amount. (II-R. 29.) After a number of discussions with the directors of the Fund, Desert Inn, which did not anticipate that the pool would produce \$350,000, agreed that the Fund would receive 10 per cent of the Calcutta pool, or \$35,000, whichever was the greater. (II-R. 28-29.)

Desert Inn's expectation that 10 percent of the Calcutta pool would not equal \$35,000 was borne out by events; the Calcutta pool was less than \$350,000 in each of the years 1953 to 1958, inclusive. The actual figures for all years in which the Calcuttas were held were (I-R. 29):

1953	\$ 93,250
1954	137,850
1955	202,500
1956	129,000
1957	265,650
1958	266,000
1959	380,000

Since Desert Inn considered a Calcutta good business, and it needed to overcome

Mr. Capps' strenuous objections to the stigma of a Calcutta in connection with his tournament, it agreed to the expense of the guarantee in excess of 10 per cent of the Calcutta pool. (II-R. 17, 20.)

Mr. Winchell requested that the Fund's name be used on the publicity in connection with the tournament as well as the Calcutta, in order to give the Fund all the publicity possible. (II-R. 74-75, 79.) He wanted the Fund's name shown "wherever and however" it could be in connection with the Tournament of Champions. (II-R. 75.)

The Calcuttas were held in the Painted Desert Room of Desert Inn. (Ex. C.) There was a blackboard on which were listed all the players who were to play in the tournament with a legend showing the 10 per cent for the Damon Runyon Fund and the 90 per cent for the winners of the pool to be distributed in stated percentages. (II-R. 35-36.)

Only persons for whom reservations were accepted were present in the Painted Desert Room on the evening when the Calcutta auction was held. (II-R. 44.) They were all prominent in entertainment and sports. (II-R. 45-46.) As part of the proceedings the welcoming speech included a statement that 10 per cent of the successful bids that night was for the Damon Runyon Fund. (II-R. 36, 54.)

Desert Inn's independent Certified Public Accountants were in charge of and responsible for the financial aspects of the Calcutta. (II-R. 34.) Most of the bidders who did not have their personal checks would use a check form, already prepared by Desert Inn, on which there was a legend

"Calcutta Fund - 90%  
Damon Runyon Cancer Fund - 10%"

(Ex. 1, II-R. 36-38.)

Desert Inn requested the Certified Public Accountants to prepare a statement of the tournament operations to submit to the Fund, but gave no indication of what it should contain or how it should be prepared. (II-R. 39.) The statement prepared by the accounting firm combined all the operations of the tournament and the Calcutta, the form of presentation having been decided upon by them. (II-R. 39.) On this statement the guaranteed minimum to the Fund paid in advance was shown as an expense and the offsetting 10 per cent from the Calcutta pool as a receipt. (II-R. 51-53, 62-63.)

The operations of the tournament and the Calcutta, as shown on the statement prepared by the accounting firm annually, resulted in a loss, which was taken as a business deduction for the respective year in issue. (II-R. 55, 62.)

#### SUMMARY OF ARGUMENT

The Internal Revenue Code of 1939 and the Internal Revenue Code of 1954 provide in identical terms that the wagering tax is imposed on a "wagering pool conducted for profit." There was no definition in the Regulations under the 1939 Code of the words "conducted for profit." In March 1959 the Treasury adopted Reg. Sec. 44.4421-1(c) (4) which defines the words "conducted for profit" to include indirect benefits. The Government has imposed the tax on the pools subject to the 1939 Code and to the 1954 Code on the ground that they resulted in indirect benefits to Desert Inn.

The District Court, in a well reasoned opinion, held that the wagering statutes under both the 1939 Code and 1954 Code were clear and unambiguous and imposed the tax on wagering pools conducted with the expectancy of a direct profit from

the pool.

The District Court relied on the well established doctrine that Congress has a wide range in imposition of excise taxes; that the history of such legislation shows that the selection is in many cases discriminatory; that Congress has often imposed such discriminatory taxes in order to turn economic currents. No excise tax better illustrates the attempt by Congress to turn economic currents than the wagering tax. Gambling is legal in Nevada; it is illegal in most of the nation; therefore gambling profits generally escaped income taxation. The legislative history of the wagering tax statute shows that Congress was imposing the tax on commercialized gambling which had theretofore been comparatively free from taxation by both State and Federal Governments. The wagering tax is thus not only a revenue measure but also a wedge to collect income taxes due on profits from gambling. But the legislative history shows also that Congress expressly excluded from the tax base a pool all the contributions of which are distributed to the winner or winners.

The Treasury relied on Reg. Sec. 44.4421-1 (c) (4) to impose the wagering tax on the pools conducted by Desert Inn, even though all the contributions were distributed 90 per cent to the winning bettors and 10 per cent on behalf of all bettors as a charitable contribution to the Damon Runyon Fund, for which the bettors were entitled to a charitable deduction. Reg. Sec. 44.4421-1 (c) (4) would impose the wagering tax on a pool not conducted for a direct profit merely because it is a link in a chain of activities, no one of which is conducted for a direct profit, on the ground that at the end of that chain there is increased revenue from a regular business activity, which is, and always has been, subject to income tax. The conclusion



of the District Court that Reg. Sec. 44. 4421-1 (c) (4) is invalid was mandated by the words of the wagering statute and its legislative history.

The Government argues in the alternative in its Point II, with no support in the record, that Desert Inn derived a direct profit from the wagering pools. The record, on the other hand, fully supports the following facts:

Desert Inn had first secured the enthusiastic support of the PGA for the Tournament of Champions idea conceived by its golf professional, Mr. Capps; Desert Inn then decided, for good business reasons, to hold a Calcutta in connection with the tournament; Mr. Capps strenuously objected to a Calcutta because of the stigma of Calcuttas generally; Desert Inn needed to overcome Mr. Capps' objections in order to retain his continued enthusiasm and prevent any unfavorable action by the PGA, which had already approved the Tournament of Champions; Desert Inn therefore offered the Damon Runyon Fund 10 per cent of the Calcutta pool for the use of its name in connection with the Calcutta; the Fund wanted a guaranteed minimum (settled at \$35,000) not merely a percentage of a pool, and Desert Inn agreed to underwrite the difference between 10 per cent of the pool and the guaranteed minimum of \$35,000, the Fund to receive whichever was the greater amount; Desert Inn was required to meet the guarantee in all years except 1959, the last year a Calcutta was held, when the Fund received \$38,000 out

year that 10 per cent of their bids would be paid on their behalf to the Fund as a charitable contribution, the remaining 90 per cent to be distributed among the winners. These record facts amply support the District Court's finding that Desert Inn derived no direct profit from the wagering pools.

## ARGUMENT

### I

THE DISTRICT COURT CORRECTLY INTERPRETED THE WAGERING TAX STATUTES UNDER THE INTERNAL REVENUE CODES OF 1939 and 1954 AS IMPOSING A TAX ON A WAGERING POOL CONDUCTED FOR A DIRECT PROFIT, AND THAT THE REGULATION UNDER THE 1954 CODE IMPOSING THE TAX ON A POOL THAT RESULTED IN INDIRECT BENEFITS IS INVALID

#### (a) The wagering tax is an excise tax.

The position of the Government in this case can only be attributed to its ignoring the fact that it is dealing with an excise tax. As this Court said of another excise tax statute in Fisher Flouring Mills Co. v. United States, 270 F. 2d 27 (9 Cir. 1959), in which the opinion of the panel holding for the taxpayer was adopted by this Court en banc as the opinion of the Court, at page 29:

"This is a new tax not previously imposed. The Congress has a wide range in imposition of excise taxes. The history of such legislation will show that the selection has been in many cases discriminatory. \* \* \* Congress has often imposed such discriminatory taxes in order to turn economic currents. \* \* \*"

No excise tax better illustrates the attempt by Congress to turn economic currents than the wagering tax. Gambling is legal in Nevada; it is illegal in most of the nation; therefore gambling profits generally escaped income taxation.

The wagering tax statute was first enacted in the Revenue Act of 1951 and



became Section 3285 of the 1939 Code. The Committee Reports accompanying that statute show that the wagering statute was directed at commercialized gambling that was escaping taxation.

House Report No. 586, 82d Congress, 1st Session (1951-2 Cum. Bull. 357, 397) and Senate Report No. 781, 82d Congress, 1st Session (1951-2 Cum. Bull. 458, 539) stated that the wagering tax was being imposed because:

"Commercialized gambling holds the unique position of being a multi-billion dollar, Nation-wide business that has remained comparatively free from taxation by either State or Federal Governments. This relative immunity from taxation has persisted in spite of the fact that wagering has many characteristics which make it particularly suitable as a subject for taxation. Your committee is convinced that the continuance of this immunity is inconsistent with the present need for increased revenue, especially at a time when many consumer items of a seminecessity nature are being called upon to bear new or additional tax burdens."

The District Court stated (I-R. 36):

"The Court takes judicial notice that Congress passed the Wagering Tax Act not only to raise revenue, but also to aid law enforcement in attempting to suppress wide-spread, nation-wide, illegal gambling activities being carried on in violation of the criminal laws of the several States."

After analyzing the Committee Reports, supra, the District Court said (I-R. 36):

"It was the intent of Congress to attempt to solve a national social problem, as well as to raise revenue. It was against profits earned from the business of conducting sport books, lotteries, numbers and policy games, as well as wagering pools that Congress took aim."

The District Court therefore interpreted Section 3285 of the 1939 Code and Section 4421 of the 1954 Code as imposing the wagering tax only on a pool conducted for a direct profit. The relevant language is identical in both Codes. Section 4421 of the 1954 Code provides:

"(1) Wager. --The term 'wager' means--

(A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers,

(B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and

(C) any wager placed in a lottery conducted for profit." (Emphasis supplied.)

The word "conducted" in (B) is emphasized since the Government's brief (App.

A, page iii) erroneously omits "conducted."

The Regulations under the 1939 Code, Reg. 132, Sec. 325.21 provided:

"(c) A wagering pool conducted for profit includes any scheme or method for the distribution of prizes to one or more winning bettors based upon the outcome of a sports event or a contest, or a combination or series of such events or contests, provided such wagering pool is managed and conducted for the purpose of making a profit."

The relevant Regulation adopted in March 1959 under the 1954 Code, Sec. 44.4421-1

(c) (1), is identical. But the 1959 Regulations include also Sec. 44.4421-1 (c) (4)

which provides:

"Conducted for profit. A wagering pool or lottery may be conducted for profit even though a direct profit will not inure from the operation thereof. A wagering pool or lottery operated with the expectancy of a profit in the form of increased sales, increased attendance, or other indirect benefits is conducted for profit for purposes of the wagering tax."

Of this Regulation the District Court stated (I-R. 37):

"A careful reading of the Wagering Tax Act leads this Court to the conclusion that Congress never intended to tax wagering pools conducted at a loss as trade stimulators."

that

"The Court finds no ambiguity in the statutory language 'conducted

for profit.' There being no ambiguity, there is nothing to construe."

and that:

"To hold the Regulation (44.4421-1 (c) (4) ) valid would require this Court to read the words of the statute in a strained and unnatural sense."

In White v. Aronson, 302 U.S. 16 (1937), also an excise tax case, the Supreme Court, holding for the taxpayer, said at pp. 20-21 that:

"Tax laws, like all other laws, are made to be obeyed. They should therefore be intelligible to those who are expected to obey them."

From its language and its legislative history, those expected to obey the statute would find it intelligible only if the wagering pool generated a direct profit to the persons managing and conducting it.

The Calcutta conducted in connection with the Tournament of Champions was a wagering pool the proceeds of which were distributed 90 per cent to the winning bettors and 10 per cent to the Fund as a charitable contribution made by all bettors.

A wagering pool, 100 per cent of which must be distributed to the participants or on their behalf to a charity, is obviously not a wagering pool conducted for a direct profit.

The relevant Committee Reports, supra, (1951-2 Cum. Bull. 398 and 540), stated that

"The requirement that the pool be operated for profit is designed to eliminate from the tax base those pools which are occasionally organized among friends or other associates, all of the contributions being distributed to the winner or winners. A pool would be considered as being operated for profit, if, for example, a person appropriated to himself a percentage of the amount contributed to the pool or required a fee for the privilege of contributing to the pool."

The Government (Br. 11) would have this Court read the above language to mean that a "wagering pool with a commercial purpose" is taxable. The Government in the next sentence (Br. 11-12) says:

"Nowhere did Congress suggest that a lottery conducted for commercial reasons and profit, whether the profit be direct or indirect, fell outside the scope of the tax."

But this case involves a wagering pool, under Sec. 4421 (1) (B), not a lottery under Sec. 4421 (1) (C). Sec. 4421 (1) (C) has two subdivisions dealing with the tax on a lottery, (1) imposing the tax on a wager placed in a lottery conducted for profit, and (2) a definition of lottery, with detailed exclusions from the term "lottery" under (2) (A), if subdivisions (i), (ii), and (iii) are satisfied, and under (2) (B) if the drawing is conducted by a tax-exempt organization.

The purposeful schematic arrangement in the Code of the tax on lotteries with its detailed definitions and exclusions makes clear that Treasury Regulation Section 44.4421-1 (c) (4) lumping the tax on the wagering pool and the tax on lotteries has created an ambiguity with respect to the wagering pool where there is none in the statute.

The Government objects (Br. 13) to the District Court's holding that the term "conducted for profit" required that the "operator of the pool take a share of the gross receipts of the pool itself," as defeating "Congressional intention"; that only the "'friendly' office type pool" was exempt. But the Committee Reports, quoted above, show clearly that Congress was contemplating exactly what the District Court held. The Committee Reports, supra, stated that (1951-2 Cum. Bull. 398, 540):

"A pool would be considered as being operated for profit, if, for example, a person appropriated to himself a percentage of the amount contributed to the pool or required a fee for the privilege



of contributing to the pool."

Nowhere in the Committee Reports is the statement that only the "'friendly' office type pool" is to be excluded from the wagering tax. The Committee Reports refer only to a pool "organized among friends or other associates, all of the contributions being distributed to the winner or winners." As the District Court opinion stated (I-R. 29; see also Finding of Fact No. VIII, I-R. 43-44):

"The following facts are not in dispute: \* \* \* On the evening prior to the beginning of the golf tournament, the name of each participating professional golfer was offered for bid by an auctioneer to a private group of persons invited to attend a dinner and the auction in the Painted Desert Room of the Desert Inn Hotel. \* \* \*" (Emphasis supplied.)

This finding establishes that the participants in the Calcutta were clearly within the exclusion referred to in the Committee Reports, supra, namely, friends of Desert Inn, all of them there by invitation, and associated for purposes of this auction, 90 per cent of the proceeds of which was to be distributed among them and the remaining 10 per cent to be contributed on their behalf to a charity.

The further statement by the Government (Br. 13) that this pool was not "one in which 'all' the wagers were returned to the participants," is directly contrary to Finding of Fact No. VIII (I-R. 44) that

"Ninety per cent of all sums received from successful bidders were paid into the pool and distributed after the tournament to the winners of the pool. The remaining ten per cent was contributed by the bidders to the Damon Runyon Memorial Fund for Cancer Research. The Desert Inn retained no percentage of the sums received and made no charge for operating the pool."

Since the District Court found that 10 per cent of the pool was contributed by the bidders to the Damon Runyon Fund and 90 per cent was paid into the pool and dis-

would argue that this pool was not "one in which 'all' the wagers were returned to the participants."

(b) "Performance for Profit" - Copyright Act Cases.

The Government's main thrust (Br. 10-11, 15, 17-18) is the interpretation of "performance for profit" in the Copyright Act. This is an excise tax case, not a copyright case. The copyright cases involve competing rights of persons, one the owner of the monopolies under the Copyright Act, the other a person who believes he has a right to use what the owner claims to be a monopoly.

In Victor Herbert, et al., v. Shanley Co., et al., 242 U.S. 591 (1917), the Court, per Holmes, J., stated at page 593:

"These two cases present the same question: whether the performance of a copyrighted musical composition in a restaurant or hotel without charge for admission to hear it infringes the exclusive right of the owner of the copyright to perform the work publicly for profit. Act of March 4, 1909, chap. 320, §1(e), 35 Stat. at L. 1075, Comp. Stat. 1913 §9517. \* \* \*"

The Court held that defendants had infringed the plaintiff's copyright (p. 594) for:

"If the rights under the copyright are infringed only by a performance where money is taken at the door, they are very imperfectly protected. Performances not different in kind from those of the defendants could be given that might compete with and even destroy the success of the monopoly that the law intends the plaintiffs to have. It is enough to say that there is no need to construe the statute so narrowly. \* \* \*"

The opinion continued that the defendants' performances were not eleemosynary, but were part of a total for which the public pays.

In the more recent case cited by the Government (Br. 10), Chappell & Co. v. Middletown Farmers Market & Auction Co., 334 F. 2d 303 (3 Cir. 1964), the defendants were authorized to sell the plaintiff's copyrighted records, but in addition



they were piping the music for the entertainment of their customers. The defendant contended that the renditions "were permissible under the Copyright Act because directed to the promotion of the records for the benefit of the copyright owners; that they amounted to 'advertisements' not 'public performance for profit.' "

The Third Circuit stated that Sec. 1(e) of the Copyright Act confers two monopolies, that of reproduction by mechanical means and that of giving public performance for profit, that in "enacting the Copyright Act, Congress sought to give the composer or copyright owner control, in accordance with the provisions of the bill, over 'the manufacture and use of such devices' "; that the surrender of the monopoly of mechanical reproduction did not carry with it the second monopoly, the right to publicly perform the copyrighted musical composition through a phonograph recording. The Third Circuit held (pages 305-6):

"The trial judge affirmatively found that the musical compositions involved were 'publicly performed for profit' \* \* \* 'to make such place of business an attractive place for the patronage of the general public.' Finding No. 4. We believe this factual finding was sufficient basis for his concluding that the renditions in this case amounted to 'public performance for profit' within 1(e) of the Copyright Act.

"The atmosphere created by the playing of recordings made shopping at the Mart more pleasurable and attractive to the patrons. Though this was not of direct pecuniary benefit, it was 'for profit' to the degree that it was commercially beneficial to the Mart to have an attractive shopping atmosphere. \* \* \*"

Chappell & Co. , cited by the Government for the proposition that "conducted for profit" in the wagering statute is to be read broadly to give the Government power to tax indirect profits, shows merely how broadly the Courts protect the monopoly of public performance for profit even where there has been a surrender

The wagering tax, on the other hand, is an excise tax and the statute is to be construed narrowly. In Lilly, et al., v. United States, 238 F. 2d 584 (4 Cir. 1956), an excise tax case, the Fourth Circuit, reversing the District Court and holding for the taxpayer, stated at page 587:

"It is well settled that taxing statutes are strictly construed against the government and in favor of the taxpayer."

Of the excise tax in Fisher Flouring Mills v. United States, supra, this Court said (at page 30) that:

"it seems clear that the Supreme Court has not abandoned the axiom that the legislative will must be ascertained from the text of the statute if the words are clear and plain and the whole enactment internally cohesive."

This Court then continued at page 31 that:

"In virtue of legislative selectivity of objects of taxation, an act levying imposts should not be construed if unambiguous even by the use of adventitious aids ordinarily available. A reference to older cases which crystallize this principle may thus be profitable."

A "reference to older cases" to crystallize the meaning of the words "for profit" without any definition thereof in an excise tax statute is profitable.

(c) "Performance for Profit" - Cabaret Tax Cases.

The cabaret tax cases involving the imposition of the excise tax on amounts paid for admissions to any "public performance for profit," in which the courts held that "profit" meant "direct profit," are clearly in point.

From 1918 to 1942 this tax was imposed on amounts paid for admissions to a "public performance for profit" which were "wholly or in part included in the price paid for refreshment, service or merchandise." Article 11 of Treasury Regulations

43, Example 2, imposed the tax where a hotel maintained in its lobby a dancing floor surrounded by tables and served refreshments to its patrons during the dancing hours, with no charge for dancing. Successive Revenue Acts had been passed since 1918, and the Commissioner's Regulations had continued unchanged throughout that period. The Commissioner lost every litigated case on the ground that where there was no increase in the price charged for refreshments or services there was no direct profit, and "public performance for profit" in the excise tax statute meant a direct profit, not an indirect profit from increased patronage.

Since the Federal courts had been interpreting "public performance for profit" in the 1909 Copyright Act for years prior to the Revenue Act of 1918 imposing the cabaret tax, their refusal to extend the Supreme Court's interpretation of the words "public performance for profit" in the Copyright Act to the excise tax on admissions to a "public performance for profit" is illuminating.

In 1929 the District Court of Colorado held for the taxpayer in United States v. Broadmoor Hotel Co., 30 F. 2d 440, that the supplying of a hotel orchestra for dancing while an afternoon tea was being served was not a public performance for profit subject to the excise tax under the 1918 and 1921 Revenue Acts. The court found that the price paid by the patrons was not excessive; that there was no increase in price attributable to the furnishing of the orchestral dance music; and it held therefore (page 441):

"It is contemplated that the entertainment referred to shall be conducted for profit and admission charged. But it may be assumed from the statement of facts that 75 cents is not an excessive charge for tea; so, where is any admission charge, and where is any direct profit, found?" (Emphasis supplied.)

In Busey v. Deshler Hotel Co., 130 F. 2d 187 (1942), the Sixth Circuit held the Regulation invalid. The Government attempts to treat as dictum (Br. 15) the holding of the District Court in that case that there was no direct profit and that therefore the cabaret tax was not applicable. The Government says (Br. 16) that "the Court of Appeals in the Deshler Hotel Co. case affirmed without mention of the dictum below." But the Sixth Circuit, at page 192 of its opinion, cited with approval the "well-reasoned district court opinion in United States v. Broadmoor Hotel Co., 30 F. 2d 440, where the facts, though differentiable in non-essentials, bear general similarity to the situation which we have confronted." In Broadmoor Hotel Co., the cabaret tax was held not applicable because there could not be any direct profit subject to the tax. In Deshler Hotel Co., as in Broadmoor Hotel Co., there was no increase in price of food or beverages during the hours dancing was permitted, and therefore there could not be any direct profit subject to the tax.

In Deshler Hotel Co., supra, the Government relied on its administrative interpretation of the cabaret tax in Treasury Regulations, and the reenactment by Congress of the cabaret tax in successive Revenue Acts after the promulgation of the Regulations. But the Sixth Circuit stated (page 191) that since the statutory provision was unambiguous, and the judicial construction was "contrariwise to the administrative interpretation," the administrative interpretation had not become "refrigerated law" because of subsequent reenactment of the statutory provision. Relying on Helvering v. Credit Alliance Corporation, 316 U.S. 107 (1942), the Sixth Circuit stated at page 191:

"that the regulation not only was contradictory of the plain terms of the subsection but attempted to add a supplementary legislative provision, which could only have been enacted by Congress. We



hold, therefore, that the court below was right in refusing to give effect to the regulation. "

And relying on Iselin v. United States, 270 U.S. 245 (1926), also an excise tax case, the Sixth Circuit in Deshler Hotel, stated at page 190:

"To become binding, interpretative regulations must be reasonable and in furtherance of the intention of Congress as evidenced by its Acts. An arbitrary regulation of the Commissioner of Internal Revenue is not enforceable. Where the language of a taxing statute is plain and unambiguous, there is no occasion for resort to interpretative promulgations of the Treasury Department. Neither the administrative officers nor the courts may supply omissions or enlarge the scope of the statute." (Emphasis supplied.)

In Iselin v. United States, supra, the Court, per Brandeis, J., held, where taxpayer had assumed she was subject to the excise tax there involved under one paragraph of the Act, but the Commissioner of Internal Revenue had imposed a larger tax under another paragraph, that taxpayer was not subject to tax under any of the paragraphs, because her activities were not included in the express language of the Act, the Court saying (page 251):

"What the Government asks is not a construction of a statute, but, in effect an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function." (Emphasis supplied.)

The Government in Deshler Hotel, supra, argued the copyright case, Herbert v. Shanley Co., 242 U.S. 591 (1917), to the Sixth Circuit, just as it is arguing that case (Br. 12 et seq.) to this Court. But, as the Sixth Circuit stated in Deshler Hotel, at page 191, the Supreme Court in Herbert v. Shanley Co.

"merely found infringement of the rights of the owner of a copyrighted musical composition, played by an orchestra in a hotel restaurant where no money was collected at the door. "

No better illustration that the copyright cases have no significance in interpreting an excise tax statute is needed than a comparison of the Sixth Circuit's decision in 1925 in the copyright case, Remick & Co. v. American Accessories Co., 5 F. 2d 411, cited by the Government (Br. 11), and the same Circuit's decision in 1942 in Deshler Hotel, supra. In Remick & Co., the Sixth Circuit, relying on Herbert v. Shanley Co., stated that the Copyright Act was directed against a commercial, as distinguished from a purely philanthropic, public use of another's corporation, and at page 412 held that:

"It is immaterial, in our judgment, whether that commercial use be such as to secure direct payment for the performance by each listener, or indirect payment, as by a hat-checking charge, when no admission fee is required or a general commercial advantage, as by advertising one's name in the expectation and hope of making profits through the sale of one's products, be they radio or other goods." (Emphasis supplied.)

In Remick & Co. there was a public performance for profit merely because there was a commercial use of the performance, irrespective of whether there was direct or indirect benefit; yet in that same Circuit in the later Deshler Hotel case there was no public performance for profit because the commercial use of the performance resulted only in indirect benefits.

After the Sixth Circuit in Deshler Hotel, supra, held that the Revenue Act was plain and unambiguous and that neither the "administrative officers nor the courts may supply omissions or enlarge the scope of the statute," the Treasury asked Congress to amend the statute. The Senate then had for consideration the Revenue Act of 1942, and the Treasury Department requested it to amend the cabaret tax act to include a definition of public performance for profit to conform with the Treasury Regulations. The cabaret tax act as thus amended in 1942 has remained



substantially unchanged, and is to be found in the 1954 Revenue Code as Sec.

4232 (c). In cases arising after the cabaret tax act was amended in 1942 it was held that the amendment was prospective only. Schuster's Wholesale Produce Co., Inc., et al., v. U. S., 49 F. Supp. 909 (D.C. La. 1943); Rogers v. Stuart, 80 F. Supp. 436 (D.C. Ariz. 1945) (for the months February through October 1942, the unamended Act was applicable, but for November 1942 the amended Act applied); Sir Francis Drake Hotel Co. of California v. United States, 75 F. Supp. 668 (D.C. Cal. 1947).

Subsequent to the amendment of the cabaret tax statute to define a performance for profit even where there was no increase in the price of food or services, the Commissioner of Internal Revenue attempted by administrative interpretation to extend further his power to impose the tax. In Revenue Ruling 54-587, 1954-2 Cum. Bull. 376, he had taken the position that payments made for refreshment and service prior to the beginning of entertainment were subject to the tax. He also sought in cases litigated to tax a portion of the amounts collected after entertainment was ended as allocable to the entertainment period. There was extensive litigation; the Commissioner lost every case, the latest in 1963. Lethert v. Culbertson's Cafe, Inc., 313 F. 2d 506 (8 Cir. 1963), where the Eighth Circuit reviewed the history of the tax from its inception. In Revenue Ruling 63-154, 1963-2 Cum. Bull. 541, the Commissioner, after nine years of extended unsuccessful litigation, announced that he was abandoning the position he had taken in Revenue Ruling 54-487, supra.

It is clear that even after the amendment of the cabaret excise tax statute in

increased patronage, the courts nevertheless held the Commissioner strictly with-  
in the precise language of the amendment. Thus are excise tax statutes construed:  
strictly against the Government.

(d) "Conducted for Profit" - Wagering Tax Statutes.

When Congress used the words "conducted for profit," without a definition of  
those words in the wagering tax statute it was obviously using them in their natural  
meaning and in their ordinary excise tax sense, a direct profit from the pool.

This Court stated of the excise tax statute involved in Fisher Flouring Mills  
Co. v. United States, 270 F.2d 27 (1959) at page 31, quoting from Addison v.  
Holly Hill Fruit Products, Inc., 322 U.S. 607, 717, that

"Legislation introducing a new system is at best empirical, and  
not infrequently administration reveals gaps or inadequacies of  
one sort or another that may call for amendatory legislation.  
But it is no warrant for extending a statute that experience may  
disclose that it should have been made more comprehensive.  
'The natural meaning of words cannot be displaced by refer-  
ences to difficulties in administration.' "

The Government (Br. 10) argues that the term "profit" does not require  
"either a 'net profit' or a 'direct profit' "; but rather "connotes all forms of pe-  
cuniary advantage or gain." The Government then argues (Br. 13) that it is well  
settled that Regulations promulgated by the agency charged with enforcing the law  
are to be given great weight and should not be overruled unless plainly inconsistent  
with the statute. The Government's confusion on the subject of "profit" may be due  
to the fact that all the cases it cites are either income or excess profits tax cases.  
The Commissioner's Regulations under the income tax and excess profits tax on  
income are accorded much more weight than are those under the excise tax statutes.

In Irwin v. Gavit, 268 U.S. 161, 166 (1925), the Supreme Court, per Holmes, J., stated that Congress intended to use its income taxing power to the full extent and that net income included "gains or profits and income derived from any source whatever." More recently in Commissioner of Internal Revenue v. Glenshaw Glass Company, 348 U.S. 426 (1955) 429-430, the Supreme Court said of the income tax statute defining gross income:

"This Court has frequently stated that this language was used by Congress to exert in this field 'the full measure of its taxing power.' \* \* \* Congress applied no limitations as to the source of taxable receipts, nor restrictive la els as to their nature. And the Court has given a liberal construction to this broad phraseology in recognition of the intention of Congress to tax all gains except those specifically exempted."

Yet even in Koshland v. Helvering, 298 U.S. 441 (an income tax case), from which the Government quotes (Br. 13-14), the language omitted by the Government in its brief appears on page 447 where the Supreme Court held:

"But where, as in this case, the provisions of the act are unambiguous, and its directions specific, there is no power to amend it by regulation."

That page on which this omitted language appears was relied on by the Supreme Court to hold invalid another wagering tax regulation in U. S. v. Calamaro, 354 U.S. 351 (1957), where the Court said at pp. 358-359:

"In light of the above discussion, we cannot but regard this Treasury Regulation as no more than an attempted addition to the statute of something which is not there. As such the Regulation can furnish no sustenance to the Statute. Koshland v. Helvering, 298 U.S. 441, 446-447, 56 S. Ct. 767, 769-770, 80 L. Ed. 1268."

Regulation Section 44.4421-1 (c) (4) would impose the wagering tax on a pool which is not conducted for a direct profit, on the ground that it is a link in a chain

of activities, no one of which is conducted for a direct profit, because at the end of the chain there is increased revenue from a regular business activity. This tortured reading of simple statutory language has no support in the Committee Reports and the contemporaneous Regulations under the 1939 Code.

The 1951 Wagering Tax Statute, the Committee Reports accompanying the Wagering Tax Statute, and the Regulations under Section 3285 of the 1939 Code, did not provide a definition of a "wagering pool conducted for profit"; but the Committee Reports expressly excluded a wagering pool all the contributions of which are distributed to the winners. Mr. Mitchell Rogovin, Chief Counsel of the Internal Revenue Service, recently stated that the Treasury Department and the Internal Revenue Service take an active part in drafting legislation and Committee Reports. Addressing the 18th Annual Federal Tax Conference of the University of Chicago Law School in October 1965, reprinted as "The Four R's: Regulations, Rulings, Reliance and Retroactivity," December 1965 TAXES-The Tax Magazine 756, Mr. Rogovin said (page 760):

"Since the Treasury Department and the IRS take an active part in drafting not only legislation but committee reports as well, the doctrine of contemporaneous construction has a real basis in fact."

The Committee Reports state that the intent of Congress was to reach the multi-billion dollar nationwide gambling business which had theretofore been relatively immune from State and Federal Governments. If Congress had intended to tax a wagering pool, all the contributions of which are distributed to the winning bettors, because the pool served a commercial purpose as a trade stimulator for a legitimate business, the income from which is subject to Federal and State taxation.



the Treasury would have provided the necessary language for the Committee Reports and the contemporaneous regulations under the 1951 Wagering Tax Statute.

Even more significant is the fact that Congress did not provide in the Wagering Tax Statute that "conducted for profit" meant "direct or indirect profit." If Congress had meant to include wagering pools, all the contributions of which are distributed to the winners, because the purpose of the pool was commercial, it would have defined the words "conducted for profit" to include indirect profit.

Appendix C, infra, illustrates thirty-three instances in the Internal Revenue Code of 1954, Subtitle A, imposing the income tax, where Congress specifically provided that the determination was to be made whether the particular result occurred "directly or indirectly." The House Ways and Means Committee and the Senate Finance Committee are completely conversant with the need to use the specific term "indirectly," even in the income tax statute, which is given the broadest possible interpretation by the Treasury and the courts.

The attempted extension of the wagering tax statute by Reg. Sec. 44.4421-1 (c) (4) to impose the tax on a wagering pool "operated with the expectancy of a profit in the form of increased sales, increased attendance, or other indirect benefits" is as arbitrary as the attempted extension of the cabaret tax statute from 1918 to 1942 to amounts paid for refreshments and service where the "public performance for profit" was given with the expectancy of a profit from increased patronage. And as the Sixth Circuit said of that cabaret tax Regulation in Busey v. Deshler Hotel Co., 130 F. 2d 187 (1942) at page 190, discussed supra, under rubric (c):

"Neither the administrative officers nor the courts may supply omissions or enlarge the scope of the statute."

The Commissioner's 1959 Regulation Section 44.4421-1 (c) (4) is not a construction of the statute but "an enlargement of it" and has created an ambiguity where none existed. The Regulation under the 1939 Code contained no such attempted "enlargement," and the ambiguity must be resolved against the Government.

The District Court correctly held that Reg. Sec. 44.4421-1 (c) (4) is arbitrary and therefore invalid.

## II

### THE DISTRICT COURT FINDING THAT TAXPAYERS HAD NOT REALIZED A DIRECT PROFIT FROM THE WAGERING POOL WAS NOT CLEARLY ERRONEOUS

The District Court found (Finding VIII, I-R. 44) that 10 per cent of the pool

"was contributed by the bidders to the Damon Runyon Memorial Fund for Cancer Research."

Despite this finding the Government, with no record references in support, argues (Br. 20) that:

"The Desert Inn wanted the sponsorship of the Damon Runyon Fund. It agreed to pay \$35,000 for this, expecting to recoup a portion of this payment from the Calcutta pool."

Since the bidders, as the District Court found, made the 10 per cent contribution to the Fund, for which they were entitled to a charitable contribution, obviously Desert Inn recouped nothing from the Calcutta pool.

The record supports the following objective facts:

the Tournament of Champions as conceived by Mr. Capps was enthusiastically



approved by the PGA (II-R. 16);

thereafter, because customers of Desert Inn requested it to conduct a Calcutta in connection with the tournament, and because of rumors that other hotels were planning a Calcutta in connection with the tournament, Desert Inn decided to hold a Calcutta (II-R. 16-17);

Mr. Capps strenuously objected to a Calcutta linked with his tournament, and to remove his objections Desert Inn decided to pay 10 per cent of the Calcutta pool to a recognized charity, the Damon Runyon Fund then being selected (II-R. 17-18, 22);

the directors of the Damon Runyon Fund wanted a guaranteed amount of \$35,000, and Desert Inn agreed to give the Fund 10 per cent of the pool or \$35,000, whichever was the greater (II-R. 29);

the bettors were all informed that 10 per cent of their bets would be paid to the Damon Runyon Fund as a contribution by them (II-R. 36-38, Finding of Fact No. VIII, I-R. 44, Ex. 1).

Desert Inn considered it good business to underwrite the difference between the bettors' 10 per cent of the pool and the minimum of \$35,000 demanded by the Fund. (II-R. 20.)

These objective facts prove conclusively that the Fund's name was needed solely to offset the stigma of a Calcutta in connection with the tournament. The Fund's name was obviously not needed to insure the success of the tournament. The success of the Tournament of Champions depended solely on the continued enthusiastic support of Mr. Capps, the creator of the idea, without which continued

the PGA would attract the high caliber sportsmen participants and spectators needed to insure the success of the tournament.

Having agreed to be a guarantor of the difference between 10 per cent of the Calcutta pool and the \$35,000 minimum, Desert Inn had no reason for delaying the payment to the Fund until after the Calcutta had been held. Mr. Winchell's desire for as much publicity as possible for the Fund in connection with the Tournament of Champions as well as with the Calcutta fit in with the advertising and publicity program of Desert Inn.

In 1959 when the pool for the first time reached, and exceeded, \$350,000, Desert Inn had no expense in connection with the Calcutta. Desert Inn considered the advantages from a Calcutta worth the underwriting cost of removing the Calcutta stigma from Mr. Capps' Tournament of Champions. Since customers and friends of Desert Inn had originally requested the Calcutta, all bettors were informed that 10 per cent of their bets would be contributed by them to the Fund, for which they would be entitled to a charitable contribution.

If Desert Inn had not decided on a Calcutta, it would not have had to spend \$25,675 of its own funds in the first year and a total of \$100,575 of its own funds in all the years in issue. (When in 1958 Desert Inn protested a proposed deficiency of more than \$1,020,000 for the years 1953-1955, its guaranteed expense for those years in excess of 10 per cent of the Calcutta, or \$61,640, was obviously not a charitable contribution, as contended by the Government, but an ordinary and necessary business expense (Ex. 4, II-R. 98-99), and the deduction was ultimately allowed.

The accounting treatment by Desert Inn's Certified Public Accountants of the

\$35,000 paid in advance by Desert Inn as guarantor and of the 10 per cent owed to Desert Inn by the Calcutta pool for the charitable contribution made by Desert Inn on behalf of all the bidders, is irrelevant for purposes of this case. District Court Finding VIII (I-R. 44) states that

"The remaining ten per cent was contributed by the bidders to the Damon Runyon Memorial Fund for Cancer Research."

Since Desert Inn advanced the 10 per cent on behalf of the bidders, the repayment of that advance was so treated by the Certified Public Accountants on the statement prepared by them for submission to the Damon Runyon Fund.

The Government argues (Br. 20), with no support in the record, that in substance Desert Inn's position with respect to the Calcutta is to be likened to a department store that runs a pool and keeps 10 per cent of the pool to help defray the cost of newspaper advertisements for the store. The District Court's finding is exactly contrary. Finding of Fact No. VIII states:

"... Ninety per cent of all sums received from successful bidders were paid into the pool and distributed after the tournament to the winners of the pool. The remaining ten percent was contributed by the bidders to the Damon Runyon Memorial Fund for Cancer Research. The Desert Inn retained no percentage of the sums received and made no charge for operating the pool." (Emphasis supplied.)

The District Court found that the "remaining ten per cent was contributed by the bidders to the Damon Runyon Memorial Fund for Cancer Research. The Desert Inn retained no percentage of the sums received and made no charge for operating the pool." There is no support either in the record or the findings for the Government's statement (Br. 21) that

"In any event, whether the \$35,000 payment was for sponsorship of the Tournament or for sponsorship of the Calcutta, it was a

business expense and the Inn was repaid a part of that expense with its ten percent share of the pool." (Emphasis supplied.)

The Government has spun a theory out of thin air as its premise, and from this premise, contrary to the record and the District Court's findings, the Government concludes (Br. 21) that this "was as surely a direct pecuniary profit to the Desert Inn from the conduct of the pool, as if the ten percent share had been used to put the putting greens in shape or to pay a part of the electric light bill in the Desert Inn's Painted Desert Room on the night of the Calcutta auction."

The Government not only seeks to impose the wagering tax on an exempt pool, but even says that Desert Inn perpetrated a fraud on the contributors to the pool when they were advised they could take a charitable deduction for the 10 per cent that was being paid to the Damon Runyon Fund; that if they took such a charitable contribution they would have been guilty of tax fraud, since they were in effect paying for the electric light bill in the Desert Inn's Painted Desert Room on the night of the Calcutta auction. Merely to state the Government's theory of a direct pecuniary profit is to refute it. Desert Inn was not a merchant retaining part of the pool to defray a portion of the expenses of holding the event but a trustee-obligee of the Calcutta; a trustee as to the 90 per cent it was required to distribute among the winning bettors in the percentile shares previously agreed upon; an obligee of all the bettors as to the 10 per cent of their bets which it had already paid on their behalf to the Damon Runyon Fund as a contribution, for which the bettors were entitled to a charitable deduction.

The District Court Finding No. XIII (I-R. 45) that Desert Inn did not realize any direct financial benefit or profit from the Calcutta pools must be sustained



unless clearly erroneous. It is submitted that this finding is amply supported by the record and is clearly correct.

### CONCLUSION

The judgment of the District Court is correct and should be affirmed.

Respectfully submitted,

WILLIAM SINGLETON  
J. A. DONNELLEY

/s/ J. A. DONNELLEY

Attorneys for Appellees

### CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ J. A. DONNELLEY

## APPENDIX A

## Internal Revenue Code of 1939:

SEC. 3285 (as added by Sec. 471 (a), Revenue Act of 1951,  
c. 521, 65 Stat. 352). TAX.

(a) Wagers. - There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof.

(b) Definitions. - For the purposes of this chapter -

(1) The term "wager" means (A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers. (B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (C) any wager placed in a lottery conducted for profit.

(2) The term "lottery" includes the numbers game, policy, and similar types of wagering. The term does not include (A) any game of a type in which usually (i) the wagers are placed, (ii) the winners are determined, and (iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and (B) any drawing conducted by an organization exempt from tax under section 101, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

(c) Amount of Wager. - In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(d) Persons Liable for Tax. - Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

\* \* \* \* \*

(26 U.S.C. 1952 ed., Sec. 3285).

## Internal Revenue Code of 1954:

SEC. 4401. IMPOSITION OF TAX.



(a) Wagers. - There shall be imposed on wagers, as defined in Section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of Wager. - In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons Liable for Tax. - Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person, who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

(26 U.S.C. 1958 ed., Sec. 4401).

#### SEC. 4421. DEFINITIONS.

For purposes of this chapter -

(1) Wager. - The term "wager" means -

(A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers,

(B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and

(C) any wager placed in a lottery conducted for profit.

(2) Lottery. - The term "lottery" includes the numbers game, policy, and similar types of wagering. The term does not include -

(A) any game of a type in which usually

(i) the wagers are placed,

(ii) the winners are determined, and

(iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and

(B) any drawing conducted by an organization exempt from tax under sections 501 and 521, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

(26 U.S.C. 1958 ed., Sec. 4221).

#### Treasury Regulations 132 (1939 Code):

Sec. 325.20 Effective period. The tax on wagers imposed by section 3285 is effective with respect to wagers placed on or after November 1, 1951.

Sec 325.21 Scope of tax. (a) Section 3285 imposes a tax on (1) all wagers placed with a person engaged in the business of accepting wagers upon the outcome of a sports event or a contest; (2) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit; and (3) any wager placed in a lottery conducted for profit.

(b) A person is engaged in the business of accepting wagers if he makes it a practice to accept wagers with respect to which he assumes the risk of profit or loss depending upon the outcome of the event or the contest with respect to which the wager is accepted. It is not intended that to be engaged in the business of accepting wagers a person must be either so engaged to the exclusion of all other activities or even primarily so engaged. Thus, for example, an individual may be primarily engaged in business as a salesman, and also for the purpose of the tax be engaged in the business of accepting wagers.

(c) A wagering pool conducted for profit includes any scheme or method for the distribution of prizes to one or more winning bettors based upon the outcome of a sports event or a contest, or a combination or series of such events or contests, provided such wagering pool is managed and conducted for the purpose of making a profit.

(d) A sports event includes every type of sports event, whether amateur, scholastic, or professional, such as horse racing, auto racing, dog racing, boxing and wrestling matches and exhibitions, baseball, football, and basketball games, tennis and golf matches, track meets, etc.

(e) A contest includes any type of contest involving speed, skill, endurance, popularity, politics, strength, appearances, etc., such as a general or primary election, the outcome of a nominating

convention, a dance marathon, a log rolling, wood chopping, weight lifting, corn/husking, beauty contest, etc.

\* \* \* \* \*

Treasury Regulations on Wagering Tax (1954 Code):

Sec. 44.4421-1 Definitions.

(a) Wager. The term "wager" means -

(1) Any wager placed with a person engaged in the business of accepting wagers upon the outcome of a sports event or a contest;

(2) Any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit; and

(3) Any wager placed in a lottery conducted for profit.

\* \* \* \* \*

(c) Other terms used -

(1) Wagering pool. A wagering pool conducted for profit includes any scheme or method for the distribution of prizes to one or more winning bettors based upon the outcome of a sports event or a contest, or a combination or series of such events or contests, provided such wagering pool is managed and conducted for the purpose of making a profit.

\* \* \* \* \*

(4) Conducted for profit. A wagering pool or lottery may be conducted for profit even though a direct profit will not inure from the operation thereof. A wagering pool or lottery operated with the expectancy of a profit in the form of increased sales, increased attendance, or other indirect benefits is conducted for profit for purposes of the wagering tax.

(26 C. F. R., Sec. 44.4421. 1).

## APPENDIX B

## EXHIBITS

<u>Plaintiffs'</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>
1	II-R. 38	II-R. 38	II-R. 38
2	II-R. 93	II-R. 93	II-R. 93
3	II-R. 93	II-R. 93	II-R. 93
4	II-R. 93	II-R. 95	II-R. 96

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A	II-R. 24	II-R. 24	II-R. 24
B	II-R. 42-43	II-R. 42-43	II-R. 43
C	II-R. 42-43	II-R. 42-43	II-R. 43
D	II-R. 50-51	II-R. 51	II-R. 51
E	II-R. 63-64	II-R. 64	II-R. 64
F	II-R. 64	II-R. 64	II-R. 64
G	II-R. 64	II-R. 64	II-R. 64
H	II-R. 64	II-R. 64	II-R. 64
I	II-R. 64	II-R. 64	II-R. 64
J	II-R. 64	II-R. 64	II-R. 64
K	II-R. 74	II-R. 74	II-R. 74
L	II-R. 81	II-R. 81	II-R. 81
M	II-R. 82	II-R. 82	II-R. 82
N	II-R. 84	II-R. 84	II-R. 85
O	II-R. 85	II-R. 87	II-R. 87
P	II-R. 85	II-R. 87	II-R. 87

## APPENDIX C

## Section 267 (a); (b); (c); (d), inclusive

- " 302 (c) (2) (B)
- " 318 (a)
- " 501 (c) (16)
- " 503 (c)
- " 503 (i)
  
- " 521 (b) (2)
- " 542 (a) (2); (c) (6) (D); (c) (7) (B); (c) (8)
- " 543 (a) (6); (a) (7)
- " 544 (a)
- " 552 (a) (2)
  
- " 553 (a) (5); (a) (6)
- " 544 (a)
- " 958 (a) (2); (b) (2)
- " 1239 (a)
- " 1249 (e) (2)
  
- " 1249 (b)
- " 1504 (d)
- " 1551 (a) (2)
- " 1563 (e) (2); (e) (3); (e) (4); (e) (5); (e) (6)

No. 20,292

IN THE

United States Court of Appeals  
For the Ninth Circuit

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KENNETH R. RICKEY,

*Appellant,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

APPELLANT'S REPLY BRIEF

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JOHNSTON & PLATT,

833 First Western Building,

Oakland, California 94612,

MARTIN MINNEY,

220 Bush Street,

San Francisco, California 94104,

*Attorneys for Appellant.*

FILED

APR 10 1964

U.S. COURT OF APPEALS  
NINTH CIRCUIT





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**APPELLANT'S REPLY BRIEF**

---

**SUMMARY OF ARGUMENT**

1. The Investigation was Far Past its "Incipient Stages" at the Time of the May 14 Meeting, and the Accusatory Stage had been Reached.
2. The Government Agents Deceived Appellant as to the Nature and Purpose of the May 14 Meeting.
3. The Facts in the Case at Bar Distinguish it From *Kohatsu v. United States*.
4. Dictum Contained in the *Kohatsu* Decision is Erroneous and Should be Corrected.
5. *Irwin v. United States* and *U.S. v. Konigsberg* are not Applicable to the Case at Bar.
6. Conclusion.

1. **THE INVESTIGATION WAS FAR PAST ITS "INCIPIENT STAGES" AT THE TIME OF THE MAY 14 MEETING, AND THE ACCUSATORY STAGE HAD BEEN REACHED.**

It is the Government's position that the accusatory stage of the proceedings against appellant had not yet been reached at the time of the May 14 meeting. Indeed, the Government suggests that the investigation did not reach the accusatory stage until the special agent's superiors reviewed the case or until the grand jury finally returned the indictment (Appellee's Brief, pp. 11-12). If the Court agrees with this argument, the right to counsel guaranteed by the Sixth Amendment will be of little or no protection to taxpayers accused of fraud.

Examinations directed at determining civil tax liability are ordinarily commenced and conducted by internal revenue agents, such as Revenue Agent Barr. Only when facts are discovered indicating probable fraud, does a special agent of the Intelligence Division enter the case. *U.S. v. Wolrich*, 129 F.Supp. 528 (S.D. N.Y. 1955). At that point, the whole focus of the investigation undergoes a radical change: It becomes primarily concerned with obtaining evidence that will support criminal charges against the taxpayer, and the determination of the taxpayer's civil liability is entirely subordinated to this purpose. From that point on, as long as a special agent is involved, he is in charge. He and his superiors continue in charge until the criminal aspects of the matter have been disposed of, and during that time neither discussion nor settlement of the civil case is possible. Murphy, *The*

*Investigative Procedure for Criminal Tax Evasion*, 27 Fordham L. Rev. 48, 58-59 (1958).

In some cases a special agent participates in the investigation from the outset. This occurs, for example, when an informer has provided information to the Government. In other cases, a special agent may enter an investigation after an examination has been commenced but before the existence of a substantial tax deficiency has been established. But in this case, when Special Agent Mott entered the investigation Revenue Agent Barr had already ascertained that Rickey had omitted from his 1960 tax return stock sales approximating \$102,000, and Barr had passed this information on to Mott as a basis for a possible criminal charge.

The Government argues that the constitutional right to counsel has not been held to attach "to the incipient stages of such an investigation" (Brief, p. 12). But this investigation was far beyond any "incipient stage." The first element of the felony offense of tax evasion had already been established, *viz.*, the existence of a substantial tax deficiency. Only the element of wilfulness remained to be proved, and this was exactly what Mott proposed to do. His primary purpose in arranging the meeting, as he admitted at the trial, was to obtain incriminating statements from Rickey (R.T. 253, lines 2-5).

Barr, acting under Mott's direction, called Rickey and arranged for his presence at the May 14 meeting in such a manner as to avoid alerting Rickey to the



significant change that had occurred in the nature of the proceedings. He deliberately led Rickey to believe that the meeting was being held to afford Rickey an opportunity to file an amended return and pay additional tax. Mott then made the arrangements necessary to record secretly what was said at the conference.

While the secret taping of the May 14 meeting may not (as appellee argues at page 13 of its Brief) change the context in which Rickey's statements were made, the fact that Special Agent Mott saw fit to make the recording, and to make it secretly, is eloquent testimony to the stage the proceedings had then reached. Mott's supposed desire to obtain an accurate recording of the conference (Appellee's Brief, pages 12-13) affords no explanation for the elaborate secrecy of the maneuver, any more than do his other explanations, namely, that he wanted to test the equipment, and that he wanted to protect himself from a possible false charge that he had threatened or abused Rickey (who was present, by himself, at a conference with three Government agents) (R.T. 370).

Under cross-examination, Mott was forced to admit that all of these alleged purposes could have been served equally well if he had told Rickey he was recording the conference (R.T. 371-372). His true reason for making the recording secretly, as he finally admitted (R.T. 372, lines 11-21; 374, lines 16-19) was to establish Rickey's inconsistency if he made later statements covering the same subject matter. The purpose was directed squarely toward obtaining the

evidence of wilfulness necessary to prove the criminal offense. Mott had reached the accusatory stage in his investigation of Rickey.

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**2. THE GOVERNMENT AGENTS DECEIVED APPELLANT AS TO THE NATURE AND PURPOSE OF THE MAY 14 MEETING.**

Appellee in its brief (page 13) asserts that "... appellant was fully and honestly informed of the situation" on May 14, that "There is nothing deceitful about the use of the tape" and that "There was no deceit." On the contrary, the evidence showed that the Government agents deliberately deceived Rickey into coming to the conference room in the mistaken belief that he would be meeting with Revenue Agent Barr and his superior for the purpose of filing an amended return for the year under audit so that he could pay the additional tax owing, when in fact he was about to be interrogated and his answers recorded without his knowledge for the specific purpose of constructing a criminal case against him.

Mott knew that Barr's last communication with Rickey concerned the filing of an amended return and the paying of a deficiency (R. 362). Mott then had Barr arrange the meeting, to avoid tipping Rickey off to the fact that he was under criminal investigation. He wanted Rickey to commit himself to statements before he realized the seriousness of the investigation and consulted an attorney. In addition, Mott directed Barr to have Rickey come to the only conference room he knew was "bugged."

Although Mott briefly displayed his credentials at the conference, he did not adequately introduce himself. He did not mention the fact that as a special agent of the Internal Revenue Service he was concerned primarily with criminal investigations, and did not tell Rickey that he was under criminal investigation. He did not even mention the words "crime" or "fraud" (R. 262).

Mott had previously equipped the conference room with a hidden microphone. Prior to the meeting with Rickey, he connected the microphone with a tape recorder, which he installed in a room across the hall. The Government would have the Court believe that this was a "last minute decision", but Mott testified that to complete his preparations before Rickey arrived, he had to run an additional wire through the hall, out a window and into an adjoining room (R. 368). He also had to obtain the services of a second special agent to operate the recorder (R. 376). If it was a "last minute decision", it was still a well-considered one.

Appellee makes much in its brief (pp. 5-6, 13) of the fact that appellant is an educated and experienced businessman. The evidence, however, is uncontradicted that appellant was not aware at the May 14 conference that he was under criminal investigation (R. 288). The evidence also demonstrates that Special Agent Mott and Revenue Agent Barr sought to keep appellant in this state of ignorance. Appellant's constitutional rights should not be contingent upon speculation as to how much he inferred from Mott's vague

self-introduction. Even an experienced businessman should not be presumed to understand the significance of the distinction between a revenue agent and a special agent, a distinction of which many attorneys, and even some judges, are not aware. Nor should the Court assume that appellant's education and experience adequately prepared him for the May 14 conference. No man should be made to act as his own attorney at such a confrontation.

Even assuming, for the purposes of argument, that appellant was effectively put on notice that he was the subject of a criminal investigation, the only bearing such knowledge would have would be on the issue of the Government agents' deceit; it would not affect appellant's right to counsel once the accusatory stage had been reached. The record is devoid of any evidence to support a conclusion that appellant competently and intelligently waived his right to counsel (*Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1018 (1938); see Appellant's Opening Brief at pages 27 and 28).

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### 3. THE FACTS IN THE CASE AT BAR DISTINGUISH IT FROM KOHATSU v. UNITED STATES.

Appellee contends that *Kohatsu v. United States*, ..... F.2d ....., No. 19,738, decided October 22, 1965, by the Ninth Circuit Court of Appeals, is dispositive of this appeal. We do not agree.

In *Kohatsu*, appellant argued that the accusatory stage is reached in a tax fraud investigation when:

involves acts of deception which occurred after the special agent had entered the case.

In *U.S. v. Wolrich*, 129 Fed.Supp. 528 (S.D.N.Y. 1955), the Court ordered a hearing to determine whether the Government agents had fraudulently obtained permission to examine the taxpayer's books and records, where there was evidence indicating that when the revenue agent represented to the taxpayer that his investigation was "routine", the special agent already had entered the case.

The situation in the case at bar thus is similar, not to *Sclafani*, but to *Wolrich*. Here the Government agents deceived appellant as to the nature and purpose of the May 14 meeting. The use of the hidden tape recorder itself was an act of stealth and trickery. Any warning inherent in the revenue agent's investigation was successfully muted by the Government agents' deceit.

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**4. DICTUM CONTAINED IN THE KOHATSU DECISION IS  
ERRONEOUS AND SHOULD BE CORRECTED.**

*Kohatsu* does not control the case at bar, because of differences in the facts and in the contentions advanced by the appellants.<sup>1</sup> Moreover, the opinion of the Court in *Kohatsu* ranged far beyond the narrow question presented.

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<sup>1</sup>Should the division hearing this appeal at bar, however, be of the opinion that the opinion in *Kohatsu* controls the appeal at bar, we respectfully suggest that the panel take the necessary steps for a hearing *en banc*. *Ellis v. Carter*, 291 F.2d 270, 273, Note 3 (9th Cir. 1961).



In *Kohatsu* the Court held that the proceeding had not reached the accusatory stage within the meaning of the Supreme Court's decision in *Escobedo* and made the following observation, which we regard as dictum:

"In taking the phrase 'focus on a particular suspect' out of context, appellant would extend the rule of *Escobedo* beyond any logical implication of the effect of that decision. The Supreme Court in *Escobedo* referred to an unsolved crime. The existence of the crime was apparent. The police were seeking to identify the offender. The accused had been taken into custody. In the instant case the essential question to be determined by the investigations of the revenue agents was whether in fact any crime had been committed. The accused had not been indicted or arrested." *Kohatsu*, *supra*, at page 6.

If this means that the accusatory stage is not reached in a tax investigation until (a) the Government agents have determined that a crime has been committed, or (b) the accused has been indicted or arrested, we respectfully suggest that the Court's reasoning is erroneous.

The Court's comments regarding the nature of the investigation in *Kohatsu* apply equally to almost all investigations of suspected tax evasion. As the Court noted in *Kohatsu*, such investigations differ from the usual police inquiry (see also Appellant's Opening Brief at pp. 20-21). It is almost invariably true in tax cases that the identity of the taxpayer is known from the beginning, that the purpose of the investigation



is to determine whether he has committed a criminal offense, and that the accused taxpayer is not taken into custody until after indictment.

To apply the rule of *Escobedo* in such a way as to conclude that the right to counsel is not present in tax cases until the special agent has concluded that a crime has been committed, or perhaps until the taxpayer has been indicted or arrested, would emasculate the Sixth Amendment's guarantee to an accused of the assistance of counsel "at every step of the proceedings against him" [*Powell v. Alabama*, 287 U.S. 45, 69 (1932)], in all criminal cases involving administrative investigations.

Surely if *Escobedo* had acknowledged the fact that he had shot diGerlando, but had claimed that he acted in self-defense or as a result of temporary insanity, the accusatory stage of the proceeding would still have been reached during the police station interrogation described in that case. But the dictum in *Kohatsu* would indicate a contrary conclusion, because there could have been no "crime" committed unless *Escobedo* had the requisite intent and capacity. Similarly, in an investigation of a suspected conspiracy to violate the anti-trust laws, the right to counsel guaranteed by the Sixth Amendment may well mature before the Department of Justice concludes that a crime in fact has been committed.

The trouble is that the dictum in *Kohatsu* argues too much. The right to counsel should not be held to await a final determination by the authorities that a "crime" has been committed, but should be held to

mature when the criminal investigators discover facts indicating that a crime has been committed, the events and transactions constituting the suspected crime are established with particularity, and the investigators begin to interrogate the chief suspect in order to accumulate evidence of guilt.

Similarly, the suggestion in *Kohatsu* that the right to counsel may not mature until the accused has been indicted or arrested is a conclusion not warranted by the reasoning of the Supreme Court in *Massiah* and *Escobedo*. Although it is true that the defendant in *Massiah* had been indicted, and the defendant in *Escobedo* had been taken into custody, it does not follow that the right to counsel is guaranteed only after indictment or arrest.

A careful reading of the Supreme Court's opinion in *Escobedo* reveals that, contrary to appellee's assertion in its brief (page 12), the Court was not concerned solely with the potential for coercion implicit in secret, unwitnessed police interrogations. If that had been the Court's sole concern, it could have elaborated the "voluntary confession" doctrine under the due process clause of the Fourteenth Amendment by, for example, requiring affirmative proof by the prosecution, through the testimony of a disinterested on-the-spot witness, that no coercion was used. Instead, the Court in *Escobedo* pointed out the evidence with which the police confronted Escobedo during the interrogation, and noted that in such a situation an accused would be motivated to speak because silence would be considered an admission of guilt and because

he would want to remove suspicion from himself by denying the accusations. The Court then declared:

“The ‘guiding hand of counsel’ was essential to advise petitioner of his rights in this delicate situation. This was the ‘stage when legal aid and advice’ were most critical to petitioner. . . . What happened at this interrogation could certainly ‘affect the whole trial,’ . . .” *Escobedo v. Illinois*, 378 U.S. at 486, 84 S.Ct. at 1762.

For appellant Rickey to have remained silent or to have refused to cooperate with the agents during the May 14 interrogation similarly would have been suspicious. The questions asked and the admissions secured by Special Agent Mott on that occasion were as crucial in Rickey’s case as the police interrogation in *Escobedo*. When Rickey arrived at that conference, unaware that he was under criminal investigation and that his answers were being recorded for use against him at his subsequent trial, his need for the assistance of legal counsel was as great as that of Danny Escobedo when he was under police interrogation.

The fact that an accused is not in custody should not preclude his right to counsel. See Enker and Elsen, *Counsel for the Suspect*, 49 Minn. L.Rev. 47, 75-76 (1964).

“Counsel does not only serve the function of providing technical aid; he is also a needed buffer at the point of confrontation between the state and the accused, put there because the accused is incapable of defending himself in this moment of stress. When the Bill of Rights was put into effect, its draftsmen recognized that the crucial

point of confrontation was at trial. The investigative process, on the other hand, was private; state and accused did not meet until the trial. Now the investigative process is in the hands of the state, and the state and the accused meet during interrogation . . . *If the standards of the Framers are to be enforced in modern times, these standards must be applied at the critical point in the criminal process, no matter where in the process that critical point moves.* Comment, *Counsel at Interrogation*, 73 Yale L.J. 1000, 1048" (Emphasis added).

*In re Groban*, 352 U.S. 330, 77 S.Ct. 510 (1956), decided nearly ten years ago, upheld by a five to four vote the power of an Ohio fire marshal to interrogate the prime suspects in an "administrative investigation" of suspected arson. There, as here, those interrogated were not in custody at the time of interrogation; there, as here, the purpose of the interrogation was to determine whether a crime had in fact been committed; there, as here, the accused claimed a denial of counsel.

In dissenting in that case, Mr. Justice Black stated:

"It may be that the type of interrogation which the Fire Marshal and his deputies are authorized to conduct would not technically fit into the traditional category of formal criminal proceedings, but the substantive effect of such interrogation on an eventual criminal prosecution of the person questioned can be so great that he should not be compelled to give testimony when he is deprived of the advice of counsel. It is quite possible that the conviction of a person charged with arson or

a similar crime may be attributable largely to his interrogation by the Fire Marshal. The right to use counsel at the formal trial is a very hollow thing when, for all practical purposes, the conviction is already assured by pre-trial examination. 352 U.S. at 344, 77 S.Ct. at 519.

“. . . (T)he Fire Marshal's interrogation is, and apparently was intended to be, an important and integral part in the prosecution of the persons for arson or a similar crime. The rights of a person who is examined in connection with such crimes should not be destroyed merely because the inquiry is given the euphonious label 'administrative.'" *Id.* at 349, 521.

We submit that the dissenting opinion of Mr. Justice Black is now the majority view of the Supreme Court. The majority opinion of the Court in *In re Groban* balanced the right to counsel against the public interest in fire prevention in order to determine whether the deprivation of counsel was contrary to "fundamental principles of liberty and justice." 352 U.S. *supra*, at 344, 77 S.Ct. at 514. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792 (1962) undermined such a balancing test by holding the right to counsel itself to be one of the "fundamental rights" of the Constitution.

In *Hannah v. Larche*, 363 U.S. 420, 80 S.Ct. 1502 (1960), Southern voting registrars challenged the constitutionality of the procedural rules of the Civil Rights Commission. In upholding the Commission's rules, the Court took care to describe the Commission's functions as investigative and fact-finding for



legislative, as opposed to *adjudicative*, purposes. *Hannah v. Larche*, *supra*, 363 U.S. at 441, 80 S.Ct. at 1514. Although the Commission cited *In re Groban* in support of its position, the Court declined to discuss the case, commenting with regard to *In re Groban* and its companion case, *Anonymous v. Baker*, 360 U.S. 287, 79 S.Ct. 1157 (1956): "Each of us who participated in those cases adheres to the view which he subscribed therein." *Hannah v. Larche*, *supra*, 363 U.S. at 451 Note 31, 80 S.Ct. at 1915 Note 31.<sup>2</sup> Finally, the majority opinion of *Escobedo*, which the four Justices dissenting in *In re Groban* joined, cited Mr. Justice Black's dissenting observation that the "right to use counsel at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pre-trial examination." *In re Groban*, *supra*, 352 U.S. at 344, 77 S.Ct. at 519, cited in *Escobedo v. Illinois*, *supra*, 378 U.S. at 487-488, 84 S.Ct. at 1763.

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<sup>2</sup>The concurring opinion of Mr. Justice Frankfurter in *Hannah v. Larche*, *supra*, 363 U.S. at 486, 80 S.Ct. at 1542, suggests a possible distinction between *In re Groban* and the appeal at bar. He stated that in *In re Groban* "the essential purpose of the Fire Marshal's inquiry was not to adjudicate individual responsibility for the fire but to pursue a legislative policy of fire prevention through the discovery of the origins of fires." *Hannah v. Larche*, *supra*, 363 U.S. at 491, 80 S.Ct. at 1545. The contrary is true of the case at bar. Special Agent Mott's inquiry was an essential part of a process for adjudicating appellant's responsibility under the tax laws.



5. IRWIN v. UNITED STATES AND U. S. v. KONIGSBERG ARE  
NOT APPLICABLE TO THE CASE AT BAR.

*Irwin v. United States*, 338 F.2d 770 (9th Cir. 1964), cited by the Government at page 10 of its brief, is not comparable to the case at bar. In that case, the defendants claimed that the right to counsel attached in two instances. The second was at a conference at which the defendant's counsel was present. The first occurred when a postal inspector submitted by mail to appellants an invitation for an offer, in order to determine whether they were then engaged in an unlawful activity. The Court has never held it to be a deprivation of a constitutional right for a law enforcement officer to make inquiry in order to determine whether a crime is then being committed. Cf. *Lopez v. United States*, 373 U.S. 427, 83 S.Ct. 1381 (1963).

In *United States v. Konigsberg*, 336 F.2d 844 (3rd Cir. 1964), also cited by the Government, the trial court specifically found, after disputed testimony, that the defendant had been advised of his right to counsel. In the case at bar it is undisputed that appellant was not so advised.

**CONCLUSION**

The judgment of the District Court should be reversed and a new trial granted.

Dated, Oakland, California,  
November 24, 1965.

Respectfully submitted,  
JOHNSTON & PLATT,  
MARTIN MINNEY,  
By J. RICHARD JOHNSTON,  
NEIL F. HORTON,  
*Attorneys for Appellant.*

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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. RICHARD JOHNSTON,  
*Attorney.*



No. 20,292

IN THE

United States Court of Appeals  
For the Ninth Circuit

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KENNETH R. RICKEY,

VS.

*Appellant,*

UNITED STATES OF AMERICA,

*Appellee.*

APPELLANT'S OPENING BRIEF

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JOHNSTON & PLATT,

833 First Western Building,

Oakland, California 94612,

MARTIN MINNEY,

220 Bush Street,

San Francisco, California 94104,

*Attorneys for Appellant.*

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No. 20,292

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

---

KENNETH R. RICKEY,

*Appellant,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

---

**APPELLANT'S OPENING BRIEF**

---

**STATEMENT OF JURISDICTION**

By an indictment filed in the United States District Court for the Northern District of California on September 9, 1964 (C.T. 1),<sup>1</sup> appellant was charged in two counts with violations of Section 7201 of the Internal Revenue Code (26 U.S.C., Section 7201) by filing false and fraudulent income tax returns for the years 1960 and 1961 with the District Director of Internal Revenue at San Francisco, California (C.T. 2-3). The District Court had jurisdiction under 18 U.S.C., Section 3231, and Rule 18, Federal Rules of Criminal Procedure. Appellant was acquitted on the first count but con-

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<sup>1</sup>Throughout this brief, references to the Clerk's Transcript will be designated by "C.T.", and references to the Reporter's Transcript will be designated by "R.T."

victed on the second count alleged in said indictment (C.T. 4), and by final judgment of May 21, 1965, was fined \$7,500.00 and was placed on probation for a period of 26 weeks, with a condition of probation being that appellant place himself in the custody of the United States Marshal each Friday evening for 26 consecutive weeks and remain in said custody for a period of 48 hours on each such weekend (C.T. 6). Appellant filed notice of appeal to this Court on May 28, 1965 (C.T. 7). The appeal was timely. Rule 37(a), Federal Rules of Criminal Procedure. This Court has jurisdiction to review the final judgment of the District Court. 28 U.S.C., Sections 1291, 1294.

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#### STATEMENT OF THE CASE

Appellant, Kenneth R. Rickey, was indicted on September 9, 1964, on two counts under Section 7201 of the Internal Revenue Code (26 U.S.C., Section 7201). The indictment alleged that appellant had understated his and his wife's taxable income and income tax liability as follows:

	1960	1961
Taxable income reported	\$110,945.00	\$24,312.00
Correct taxable income	147,027.00	38,794.10
Income tax liability reported	49,819.00	6,653.00
Correct income tax liability	67,954.00	13,594.79

The evidence showed that the following items of income had been omitted from the tax returns filed by appellant:

## 1960

Long-term capital gain from sale of General Telephone & Electronics Corp. stock		Total gain	\$72,254.01
		50% taxable	\$36,127.00

## 1961

*Long-term capital gain from sale of stock:*

Coca-Cola Co.	\$ 3,623.84
Island Creek Coal Co.	341.46
General Telephone & Electronics Corp.	15,051.31
” ” ” ”	5,017.10
” ” ” ”	5,017.10
<hr/>	
Total gain	\$29,050.81
50% taxable	\$14,525.00
<hr/>	

*Dividend income:*

Coca-Cola Co.	\$ 60.00
Island Creek Coal Co.	75.00
	<hr/>
Total	\$135.00
	<hr/>

The foregoing data are summarized in computations made by the witness Forrest Calkins, a Technical Advisor of the Internal Revenue Service (Ex. 36, 37). At the conclusion of the evidence, the parties stipulated that the amounts of income set forth above had been omitted from appellant's returns (R.T. 650).

The jury found appellant not guilty of count one of the indictment but guilty of count two (C.T. 4).

During the trial, appellant objected to the introduction of evidence of any statements that appellant made to Internal Revenue Service agents at a con-

ference held on May 14, 1962, in the Internal Revenue Offices, and moved to suppress such evidence on the ground that said statements were taken in deprivation of appellant's right to counsel guaranteed by the Sixth Amendment to the United States Constitution (R.T. 239, 305, 313). The Court below overruled the objection and denied the motion to suppress (R.T. 306). The specification of error is addressed to this ruling.

The Internal Revenue Service began its investigation of appellant's tax returns for the year 1960 in early April, 1962, when Internal Revenue Agent Berton J. Barr commenced an audit of appellant's returns for that year (R.T. 174). On April 19, 1962, Revenue Agent Barr wrote appellant a letter requesting an interview (R.T. 175). Appellant responded by telephone a few days later and he and Revenue Agent Barr arranged for Barr to come to appellant's home in order to examine appellant's tax return and substantiating documents (R.T. 175-176).

On April 26, at appellant's home, Revenue Agent Barr told appellant that he wanted to compare the dividends appellant had reported on his 1960 tax return with the shares of stock appellant owned and to compare the income as shown on the tax return with the deposits in appellant's bank account, as recorded in appellant's bank statements (R.T. 176-177). Appellant responded to Barr's request for information regarding the stock shares by providing Barr with a ledger containing the dividend information (R.T. 178). Appellant and Barr then computed a

proposed additional tax, including interest to date, which appellant agreed to pay when Barr's findings were approved by his superiors (R.T. 180).

When Barr returned to his office, however, he was unable to reconcile the dividends as shown on the returns, plus the additional information appellant had given him, with the total number of shares owned (R.T. 181). Revenue Agent Barr then wrote to appellant on April 30, informing him of this discrepancy (R.T. 183-185), and on May 8, appellant telephoned Barr and informed him that he had forgotten to report the sale of 1300 shares of General Telephone stock at a total selling price of approximately \$102,000.00 (R.T. 186). Immediately, Revenue Agent Barr made another appointment and the next day he went to see appellant at his residence (R.T. 186).

Barr's second meeting with appellant at his home lasted between one and two hours (R.T. 282). Appellant had prepared an analysis of the sales of General Telephone stock with the dividends (R.T. 283). Appellant and Barr went over the worksheet and analysis in detail, while appellant attempted to explain the omission of the General Telephone stock sales from his 1960 return. At the end of the interview, appellant stated that he would like to file an amended return and pay the tax deficiency (R.T. 284, 524). Barr informed appellant that he wanted to discuss this matter with his superiors and that he would call appellant as soon as he had discussed it with them (R.T. 284).

On returning to his office, Revenue Agent Barr reported to Glenn Adrian, head of the fraud group



of the Audit Division of the Internal Revenue Service (R.T. 250, 356-358). Adrian sent Barr to the office of Marc P. Mott, a Special Agent of the Intelligence Division (R.T. 250). It is the function of the Intelligence Division of the Internal Revenue Service to investigate possible criminal violations of the Internal Revenue Code (R.T. 359). Special Agent Mott learned that Revenue Agent Barr, in his examination of appellant's 1960 tax return, had discovered that appellant had failed to report over \$100,000.00 in sales of General Telephone & Electronics Corp. stock; that Revenue Agent Barr had the details of the total selling price, the gain and the amount of the tax involved; and that appellant had admitted this (R.T. 358). Special Agent Mott knew that appellant had talked with Revenue Agent Barr about filing an amended return (R.T. 362).

Mott instructed Barr to suspend his investigation of appellant's return (R.T. 235, 362) and told Barr to telephone appellant and ask him to come to the twenty-first floor at 100 McAllister Street, San Francisco (R.T. 363). The conference room on the 21st floor at 100 McAllister Street was equipped with a hidden microphone, which Mott himself had installed a week or so previously (R.T. 255). It was the only room Mott knew to be so equipped (R.T. 257). Mott did not tell Barr to advise appellant that a special agent of the Intelligence Division wanted to meet with him (R.T. 235).

On the same or following day, Revenue Agent Barr called appellant and arranged for the conference. Barr

told appellant that he had discussed the matter with his superiors, that it would be satisfactory for appellant to file an amended return and pay the additional tax owing for 1960, and that he and Mr. Glenn Adrian would be present at the conference (R.T. 285, 524). Barr told appellant to go to the 21st floor at 100 McAllister Street, but he made no reference to the Intelligence Division, to any special agent, to a fraud investigation, or to a possible criminal prosecution (R.T. 524-525).

Although it is not a routine practice to tape-record secretly what is said in a conference (R.T. 255), shortly before appellant was scheduled to arrive for his conference with Barr and Adrian, Special Agent Mott connected a tape-recorder in a nearby room to the hidden microphone which he had previously placed inside a telephone terminal box in the conference room (R.T. 254-255, 363-364). To complete his preparations, Mott ran an additional wire down the hall, out the window and back into another room (R.T. 367-368), where he stationed Special Agent Hilkie to operate the tape-recorder (R.T. 376). On only one other occasion did Mott use the hidden tape-recorder (R.T. 270).

Special Agent Mott's objective at the May 14 meeting was to question appellant regarding the circumstances behind the unreported sales of the \$100,000.00 worth of General Telephone stock. Mott had not yet reached a definite conclusion to prosecute appellant. He testified that his specific purpose for interrogating appellant was to obtain incriminating statements, if possible, and to listen to any possible explanations

(R.T. 252-253). Among the several reasons Special Agent Mott gave for secretly tape-recording his questioning of appellant were that he wished to test the truthfulness of appellant, that he anticipated questioning appellant in the future and comparing the consistency of appellant's subsequent answers with the answers appellant would give at their first confrontation, and that he wanted to be able to prevent appellant from ever being able to demonstrate anything to the contrary of his first statement (R.T. 372, 374). Special Agent Mott secretly records conferences with taxpayers when he believes that the taxpayer may make an admission or explanation and that, at a later time, the taxpayer may change his testimony (R.T. 271).

Appellant arrived at the May 14 meeting for the purpose of filing an amended return, and he took with him a check to pay the additional tax owing (R.T. 296). Appellant was not accompanied by counsel. He had not contacted an attorney in connection with the tax investigation because he did not feel that he had any reason for doing so (R.T. 287). He was not aware that there was a question of fraud in his case or that his case might involve possible criminal prosecution (R.T. 288). He had had no contact with any special agent of the Intelligence Division prior to May 14, 1962, he did not know what a special agent was or what his functions were, and he had never known of an audit involving the Intelligence Division (R.T. 287-289). He did not know that the Intelligence Division was particularly concerned with tax fraud

or that it was frequently involved in cases where criminal prosecution was under consideration (R.T. 288). Appellant came to the meeting, expecting to meet Revenue Agent Barr and Glenn Adrian, whom he assumed to be Barr's superior (R.T. 289, 525).

On being introduced, Special Agent Mott showed appellant his pocket credentials as a special agent, which appellant glanced at only briefly (R.T. 286). Appellant assumed that Special Agent Mott was there as Mr. Barr's superior (R.T. 536). Mott told appellant that he was a special agent in the Intelligence Division and that it was his job to determine whether appellant had wilfully failed to report a substantial amount of capital gain on his 1960 return (R.T. 261). Mott informed appellant, "that he did not have to answer any of my questions or give me any documents or records if he felt such action would tend to incriminate him, and that if he did answer any of my questions or give me any documents, that the testimony could be used against him." (R.T. 265). Appellant, nevertheless, was not aware that this was a criminal investigation (R.T. 291). Special Agent Mott made no reference to any possible criminal investigation, nor did he use the words, "fraud" or "fraudulent" (R.T. 262). *Special Agent Mott did not advise appellant of his right to counsel nor of his absolute right to remain silent* (R.T. 234, 535-536).

Present at the May 14 meeting were Revenue Agent Barr, Special Agent Mott, appellant and a shorthand reporter or stenographer, who recorded a question-and-answer statement (R.T. 376, 534). But the tape-

recorder had been operating before the stenographer arrived in the room and it continued after she left (R.T. 376). Appellant, of course, was not aware that his conversation was being taped. The existence of the tape-recording was not disclosed to appellant until after the start of his trial (R.T. 100, 540-541). At the May 14 conference, the stenographer recorded a sworn statement from appellant (Ex. 30) which was admitted into evidence over objection (R.T. 311-316). During the sworn statement, Special Agent Mott interrogated appellant in detail regarding his failure to report the 1300 shares of the General Telephone stock sales (R.T. 321-334).

After the question-and-answer statement had been concluded and the stenographer had left the conference room, there was further conversation between appellant and Special Agent Mott. Mott reminded appellant that appellant had told Barr he was going to check his 1961 return, after discovering the omissions from his 1960 return (R.T. 334-335). In response to Mott's question, appellant replied that he had discovered that some sales of Island Creek Coal Co. stock and Coca-Cola Co. stock had been inadvertently omitted from his 1961 return (R.T. 335). Mott testified at the trial, over objection, that appellant then explained that he had discovered the omission by going to his broker and checking over all of his brokerage statements (R.T. 335). Mott also testified, over appellant's objection, that this explanation was contained in the tape-recording that had been secretly made at the May 14, 1962 meeting (R.T. 341). Appel-



lant's motion to strike this testimony was denied (R.T. 341). The tape-recording itself was not offered in evidence.

Special Agent Mott further testified that on August 15, 1962, and September 21, 1962, appellant had told Mott that he had discovered the omission of the Island Creek Coal and Coca-Cola stock sales when he looked through his desk drawers and discovered a ledger sheet that had been misplaced and consequently had not been reflected in his 1961 return (R.T. 340). On both of those later occasions, appellant had denied giving the earlier inconsistent explanation (R.T. 340). Appellant testified at the trial that he had no recollection of having made the first explanation (R.T. 619, 620). Appellant's conviction was on the count relating to the year 1961.

At the May 14 meeting, after discussing the omitted sales of Island Creek Coal and Coca-Cola stock, Mott asked appellant if there was anything else that he wished to bring up or anything else wrong with his returns (R.T. 336). In Mott's words, ". . . he said that there was a technical item involving 1961 that wouldn't concern me and that he could discuss it with Agent Barr and that I could leave. I told Mr. Rickey I was not going to leave, that I was in charge of this investigation, that if he had anything to bring up, that he could tell it to both of us." (R.T. 336).

Appellant then told the agents that in 1961 he had had a transaction with one Robert Huff that he thought qualified as a nontaxable exchange (R.T. 337).



Appellant explained the transaction, and the agents advised him that it involved a taxable sale of securities. Specifically, appellant should have reported on his 1961 return the gain from the sale of 1,000 shares of General Telephone & Electronics Corp. stock, as reflected in Exhibit 37.

Appellant was not represented by counsel at the May 14 meeting, nor was he advised of his right to counsel. He was represented by counsel at all his subsequent meetings with Special Agent Mott (R.T. 387).

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#### **SPECIFICATION OF ERROR RELIED UPON**

1. The trial court erred in admitting evidence of statements allegedly made by appellant at a meeting with Special Agent Marc P. Mott and Internal Revenue Agent Berton J. Barr on May 14, 1962.

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#### **SUMMARY OF ARGUMENT**

1. Prior to the May 14, 1962, meeting, it had been ascertained that appellant had omitted a substantial amount of income from his 1960 return. The internal revenue agent making the audit had reported this fact to a special agent of the Intelligence Division, who had then taken charge of the investigation. Under the direction of the special agent, the revenue agent arranged for appellant to come to the offices of the Intelligence Division on May 14, 1962. At that time a question-and-answer statement was taken from him,

and the special agent undertook to make a secret tape-recording of that entire conference. His purpose was to obtain evidence of wilfullness which would warrant criminal prosecution.

Under the circumstances of the case, the accusatory stage in the proceeding had been reached on May 14, 1962, and under the rule of *Escobedo v. Illinois*, appellant had a constitutional right to counsel at that time. The fact that he had not been taken into custody is immaterial, in view of the differences in the procedures followed in the investigation of tax evasion from those followed in the investigation of other criminal offenses.

2. When appellant was interrogated on May 14, 1962, he was unaware that the purpose of the proceeding was to obtain evidence of guilt. In this case, as in *Massiah v. U. S.*, the Government employed deceit in order to interrogate appellant in the absence of counsel, and evidence of his incriminating statements was used against him at his trial. His effective right to counsel was thus violated.

3. Since, due to the methods followed by the government agents, appellant was unaware of his need for counsel, it cannot be said that he waived his right to counsel by not requesting it.

### ARGUMENT

1. WHEN APPELLANT MET WITH SPECIAL AGENT MOTT AND INTERNAL REVENUE AGENT BARR AT THE OFFICES OF THE INTERNAL REVENUE SERVICE ON MAY 14, 1962, THE ACCUSATORY STAGE IN THE PROCEEDINGS AGAINST APPELLANT HAD BEEN REACHED, AND APPELLANT WAS ENTITLED TO THE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT TO THE CONSTITUTION.

When Internal Revenue Agent Berton J. Barr was assigned to examine appellant's 1960 return, it was for the purpose of determining whether any civil tax adjustments should be made (R.T. 174). His examination led to the discovery by appellant that he had failed to include in his 1960 return the gain from the sale of a block of General Telephone & Electronics Corp. stock (R.T. 186).

The omitted transactions involved a total sale price of \$101,793.91, resulting in a gain of \$72,254.01, of which 50% or \$36,127.00, was taxable (Ex. 36).

The day after appellant had disclosed the omission to Barr, they met again at appellant's home (R.T. 186). After some discussion in which appellant explained how the omission had occurred, he told Barr he would like to file an amended return and pay the deficiency (R.T. 284, 524). Barr replied that he would discuss it with his superiors and that he would call appellant as soon as he had done so (R.T. 284).

At this point, the whole complexion of the case changed. Instead of taking the question up with his regular supervisor, Barr reported his findings to Glenn Adrian, head of the fraud group in the Audit Division (R.T. 250, 356-358). Adrian sent him up

to see Special Agent Marc P. Mott, to whom he reported the omission from appellant's return (R.T. 250). Whereas Barr had told appellant that he would determine whether it would be proper for appellant to file an amended return and pay the additional tax owing, there is no evidence that he discussed these questions with anyone. Instead, he reported the case to Adrian, obviously as a possible fraud case.

Mott testified as follows (R.T. 251, line 11 to 252, line 1):

“Q. Did he [Barr] make any statement to you as to why he was giving you this information?

A. Well, it was understood there was a substantial amount of omitted income in the year 1960 to which Mr. Adrian or Mr. Barr, and myself, raised the possibility that it was wilfully omitted.

Q. So that all three of you understood at that point, whatever your conversation may have been, that this might be a fraud case?

A. Yes.

Q. And by that you all equally understood that it might result in criminal prosecution, isn't that correct?

A. I can't speak for Mr. Barr or Mr. Adraian (sic) For myself, yes.

Q. This was your understanding?

A. Yes.”

Mott's purpose in arranging the May 14 meeting, according to his own testimony, was to obtain statements from appellant that might be incriminating (R. T. 253, lines 2-5):

“Q. And this was for the purpose, was it not, if possible, of obtaining statements which might be incriminating?”

A. Yes, if possible, yes, yes.”

Mott testified that his purpose was also to ascertain if there were explanations that could have cleared up the entire matter and obviated prosecution (R.T. 253, lines 7-11), but he definitely thought it might be a fraud case (R.T. 253, lines 19-23). His actions clearly demonstrated his real feelings about the case:

(a) He instructed Barr to suspend his audit (R.T. 235, line 15).

(b) He told Barr to telephone appellant and ask him to come to the 21st floor at 100 McAllister Street, San Francisco (R.T. 363) (where the Intelligence Division offices were located), but he did not instruct Barr to mention the Intelligence Division or to advise appellant that a special agent wanted to talk to him (R.T. 235).

(c) He made elaborate preparations to record the conference secretly.

When Barr called appellant, he told him that he had discussed with his superiors the question of filing an amended return and paying the additional tax, and that it would be satisfactory to do so (R.T. 524). He said that a Mr. Glenn Adrian would be present, but he did not identify Adrian. Appellant naturally assumed that Adrian was Barr's superior (R.T. 524, 525).

Mott testified under cross-examination that he had three reasons for making the tape-recording (R.T. 370):

(a) He wanted to test the equipment under actual working conditions.

(b) He wanted to obtain an accurate transcription of the conference.

(c) He wanted to protect himself from a possible false charge that he had threatened or abused the taxpayer.

When it was pointed out to him that he could have accomplished all three of these purposes equally well if appellant had known the recording was being made, he attempted to explain his answers as follows (R.T. 372, line 11 to 374, line 19):

“A. In a criminal case and especially, I mean, as far as Internal Revenue laws, one of the things that we have to find out is whether someone wilfully omitted some income or made other overstatements of expenses or whatever the issue may be, as opposed to making a mistake. And one of the ways of reaching this decision is to test the truthfulness of the person. And if Mr. Rickey had known that the conversation was being recorded, I don't believe that he would ever be able to demonstrate anything different, anything to the contrary.

Q. Your real purpose, then, was to try to catch Mr. Rickey in some statement that could be used against him later on, wasn't it?

Mr. Brosnahan: Object to the form of the question. That isn't what the witness said. He said



he wanted to find out whether or not the witness was truthful.

Mr. Johnston: I think it is proper cross-examination.

Mr. Brosnahan: I think that it is argumentative and not accurate.

The Court: Well, reframe it and we will see.

Q. Mr. Mott, wasn't your real purpose in using this equipment and using it secretly—was not really to test the equipment and not really just to get an accurate record of what was said and not really just to protect yourself against some improper charge later, but to try to entice and catch Mr. Rickey in making some statement that could be used against him later on?

A. No, sir; I believe it's a combination of the factors that I have just told you which I think were primarily four.

Q. Well, you mentioned only three, I think, originally.

A. Well, I expanded on that, the testing of the truthfulness of the——

Q. I see.

A. I anticipated I may talk to him at a later time and that he might discuss the same thing and see if we have—if the answers are consistent with his first statement."

Thus, prior to the May 14 meeting, Mott not only anticipated future interrogations of appellant; he was preparing the proof of the prosecution's case. His purpose at that meeting was to catch appellant in inconsistent statements, and according to his testimony at the trial he succeeded in that purpose.

The only reasonable conclusion to be drawn from the foregoing facts is that the accusatory stage of the proceeding had been reached at the time of the May 14 meeting. The proceeding had changed from a routine audit by Revenue Agent Barr to a joint investigation directed by Special Agent Mott. It was already known that appellant had omitted a large amount of taxable income from his 1960 return; all that remained was to develop evidence of wilfulness. This was Mott's express purpose at the May 14 meeting.

Under the rule of *Escobedo v. Illinois*, 378 U.S. 478, 84 S. Ct. 1758 (1964), when a criminal investigation enters the accusatory state, the accused has a constitutional right to counsel under the Sixth Amendment to the Constitution. In that case the defendant, who was later convicted of murder, had been taken into custody and interrogated at length by the police. Although he repeatedly asked to speak to his lawyer, and his lawyer was at police headquarters attempting to see his client, the defendant and his lawyer were not permitted to consult. Nor was the defendant advised of his absolute constitutional right to remain silent. The defendant's motions to suppress incriminating statements made under this interrogation were denied. The Supreme Court reversed the judgment of conviction.

The Supreme Court's decision in *Escobedo* was of course based upon the facts of that case, and those facts differed from the facts in this case. But the

principle of that decision should apply equally in the circumstances of this case.

The factual differences in the two cases stem from differences in the procedures followed in tax evasion investigations from those followed in the investigation of other felonies, such as murder. In a tax investigation, the defendant is never taken into custody prior to the completion of the investigation and the return of an indictment. His identity is known from the beginning, however, and the entire point of the investigation is to determine whether he has committed the crime of wilfully attempting to evade and defeat his taxes. In the case of almost any other felony, on the other hand, the fact that an offense has been committed is generally known at the outset, and the purpose of the investigation is to identify the guilty party.

If the right to counsel were limited to defendants in actual custody, it would have virtually no application to persons suspected of income tax evasion, since the taxpayer under suspicion is almost never in custody at the time he is interrogated. But it is when he is under interrogation that he has his greatest need of counsel, and this need is no less merely because he is not in custody.

Whether or not the defendant is in custody should be considered significant only as evidence of whether the accusatory stage has been reached. When a murder is known to have been committed, the person who is believed to have committed the offense is ordinarily

taken into custody and at that point, under *Escobedo*, the proceeding has reached the accusatory stage. The Court said:

“We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer.” 378 U.S. at 492, 84 S. Ct. at 1766.

In a tax investigation, the person suspected of having committed a criminal offense is known from the beginning, and the purpose of the Treasury agents is to determine whether an offense has in fact been committed. Thus, in the present case, it had been ascertained that appellant had omitted a substantial amount of income from his return; the question remaining was whether this had been done wilfully. If so, an offense had been committed, and there was no question from the start about who had committed it. The proceeding entered the accusatory state when Mott took command of the investigation, instructed Barr to have appellant come to the offices of the Intelligence Division, and arranged to record the conversation.

In *Massiah v. United States*, 377 U.S. 201, 84 S. Ct. 1199 (1964) the Supreme Court reversed a conviction for narcotics offenses because federal agents had by pre-arrangement surreptitiously listened to incriminating statements made by the defendant after he had been charged, had entered a plea of not guilty, and had been released on bail. The use of this evidence

at the trial was held to violate the defendant's constitutional right to counsel. *Escobedo* represents an extension of this holding to an interrogation conducted prior to indictment, on the ground that the accusatory stage had been reached.

This Court has held in a recent opinion that the rule of *Escobedo* as to the defendant's right to counsel applied "... if the investigation was then no longer a general inquiry but had focused on appellant . . ., interrogation was conducted leading to incriminatory statements, appellant had requested and been denied counsel and appellant had not been effectively warned of his absolute constitutional right to remain silent." *Wright v. Dickson*, 336 F. 2d 878, 882 (9th Cir. 1964).

Appellant went to the May 14 meeting in the belief that he was to meet with Revenue Agent Barr and his superior for the purpose of filing an amended return and paying a tax deficiency. He took with him the amended return and a check to pay the deficiency (R.T. 296). Although Mott was introduced as a special agent of the Intelligence Division, this had no meaning to appellant, who assumed that Mott was simply present as Barr's superior. The warning of his constitutional privilege against self-incrimination failed to alert appellant to the fact that this was a criminal investigation (R.T. 291). He was not told of his right to counsel nor of his right to remain silent (R.T. 234, 535-536).

If appellant's constitutional right to counsel was to be of any real value to him, it was at precisely that stage of the proceeding. He was totally unaware



of his jeopardy; but competent counsel would have recognized that jeopardy at once and would have advised appellant accordingly. Experienced counsel would have realized that Special Agent Mott was not concerned with the payment of a civil deficiency, but with possible criminal prosecution; he would have appreciated the significance of Mott's warning about possible self-incrimination.

Congress, as well as the Courts, has recognized that at such a confrontation, fairness requires that a taxpayer be entitled to the advice of counsel. The Administrative Procedure Act, 5 U.S.C., Section 1005(a), provides that any person subpoenaed by a special agent and every party in any agency proceeding has the right to representation by counsel. See, e.g., *U.S. v. Smith*, 87 F. Supp. 293 (D. Conn. 1949). In describing the value of an attorney's assistance in a tax fraud investigation, this Court has commented in a slightly different context:

"Few areas of the law draw so many individuals in contact with governmental powers as does federal taxation. Yet this branch is one of the thickest of the law's 'bramblebush'. The ramifications of tax law are often a stubborn challenge to the most expert legal practitioner. The very nature of the tax laws requires taxpayers to rely upon attorneys . . ." *U.S. v. Judson*, 322 F.2d 460, 468 (9th Cir. 1963).

In this case, a critical confrontation between appellant and the Government occurred at the interrogation on May 14, 1962. The investigation changed to an ac-



cusatory stage at that time, and it was at that time that appellant's constitutional right to counsel matured. To hold otherwise would be drastically to restrict the constitutional right in tax cases as contrasted with cases involving other kinds of criminal offenses.

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**2. APPELLANT'S CONSTITUTIONAL RIGHT TO COUNSEL WAS VIOLATED BY THE TREASURY AGENTS AT THE MAY 14 MEETING.**

As we have shown, at the May 14 confrontation, Special Agent Mott employed deceit in order to interrogate appellant for the purpose of eliciting incriminating statements from him before appellant realized that a criminal investigation was proceeding against him in which he would need the advice of counsel. The situation, thus, is similar to that in *Massiah v. U.S.*, 377 U.S. 201, 84 S. Ct. 1199 (1964), and *Queen v. U.S.*, 335 F.2d 297 (D.C.Cir. 1964).

In *Massiah* the defendant, who had been indicted and had retained an attorney, held a conversation, in the absence of his counsel, with one of his co-defendants while sitting in the latter's automobile. The defendant was unaware that the co-defendant, cooperating with Government agents, had allowed the installation of a radio transmitter under the front seat of the car, by means of which a federal agent was listening to the conversation. At defendant's trial, the federal agent, over defendant's objection, testified to incriminating statements made by the defendant during this conversation. The Supreme Court reversed the conviction on the ground that the defendant had been de-

nied the basic protection of the Sixth Amendment right to counsel, "when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." 377 U.S. at 206, 84 S.Ct. 1203.

In the case at bar, as in *Massiah*, the government employed a series of deceptions in order to interrogate appellant, who was unaware that the purpose of the interrogation was to obtain evidence of guilt. In the case at bar, as in *Massiah*, there was used against appellant at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him in the absence of counsel.

In *Queen v. U.S.*, supra, the police questioned the accused informally in a courthouse waiting room after she had been arrested, brought before the United States Commissioner, and secured a continuance in order to obtain an attorney. The Court reversed her conviction, based in part upon her damaging admissions which the police obtained during that questioning:

"The result of this intervention by the officers was to frustrate the right of the accused to have the assistance of counsel until by reason of these extrajudicial proceedings such assistance would be rendered fruitless if the statements thus obtained could be used to convict. For this reason, and notwithstanding the absence of an indictment, the case clearly comes within the reasoning which led to the exclusion of the evidence in *Massiah* and *Escobedo*." 335 F.2d, at 298.

See also *Greenwell v. U.S.*, 336 F.2d 962, 966 (D.C.Cir. 1964), holding that statements obtained from the police while they delayed bringing the defendant before a magistrate were inadmissible under the *Mallory* and *McNabb* rules, and noting that under the *Massiah* and *Escobedo* cases, "Interviews by government agents with accused persons in the absence of counsel may be employed to develop investigative leads as to others, but not to produce evidence for the trial of the accused."

Where, as in the case at bar, federal agents deliberately deceive an accused into making incriminating statements before he realizes that he is under intensive criminal investigation and while he is without the assistance of counsel, under the principles of the *Massiah* and *Queen* cases his incriminating words cannot be used against him at his trial.

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3. APPELLANT CANNOT BE SAID TO HAVE WAIVED HIS RIGHT TO COUNSEL, NOR CAN HIS RIGHT TO COUNSEL, UNDER SUCH CIRCUMSTANCES, BE SAID TO BE CONDITIONED UPON A REQUEST.

Appellant's right to counsel in the case at bar cannot be said to be conditioned upon a request to consult with an attorney. Appellant did not have counsel with him at the May 14 interrogation because he did not realize that he had a need for counsel (R.T. 287-289, 525); he was not aware that he was under criminal investigation (R.T. 291). We have traced the methods to which the government resorted to keep appellant in that state of ignorance. The Court in

*Massiah* did not condition the defendant's right to counsel upon a request, because in *Massiah*, as in the case at bar, the Government had tricked the accused into making incriminating statements while he was unaware that he was being interrogated in order to accumulate evidence of guilt for his criminal prosecution.

Furthermore, this Court has noted that “. . . it makes no difference whether appellant asked to consult with retained counsel or to be provided with the assistance of appointed counsel, nor, indeed, whether he requested counsel at all, except as the latter fact may bear upon waiver.” *Wright v. Dickson*, supra, 336 F.2d at 882.

Appellant cannot be held to have waived his right to counsel because, due to the methods followed by the Government, appellant was unaware of his need for counsel. In *Carnley v. Cochran*, 369 U.S. 506, 513, 82 S.Ct. 884 (1962), the Court said:

“ . . . It is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request.” Accord, *People v. Dorado*, 62 A.C. 350 (1965).

The waiver of a constitutional right is defined as an intentional relinquishment or abandonment of a known right or privilege, which cannot be effected unless it is intelligently and competently given. *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019 (1937); *Griffith v. Rhay*, 282 F.2d 711, 717 (9th Cir. 1960). Not only did Special Agent Mott fail to inform appellant of his unconditional right to remain silent

or his right to counsel, but the uncontradicted evidence clearly shows that Special Agent Mott arranged the meeting in order to interrogate appellant at a time when appellant was not aware that he was being investigated for a possible criminal violation. In such circumstances, it cannot be said that appellant "waived" his right to counsel.

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### CONCLUSION

Appellant respectfully submits that the judgment of conviction on the second count of the indictment should be reversed and a new trial granted.

Dated, Oakland, California,  
September 20, 1965

Respectfully submitted,

JOHNSTON & PLATT,  
MARTIN MINNEY,

By J. RICHARD JOHNSTON,  
NEIL F. HORTON,

*Attorneys for Appellant.*

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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. RICHARD JOHNSTON,  
*Attorney for Appellant.*

**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

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NATIONAL LABOR RELATIONS BOARD,  
*Petitioner,*

v.

LANE-COOS-CURRY-DOUGLAS COUNTIES  
BUILDING & CONSTRUCTION TRADES  
COUNCIL, AFL-CIO; CARPENTERS LOCAL  
UNION No. 1273, UNITED BROTHERHOOD  
OF CARPENTERS & JOINERS OF AMERICA,  
AFL-CIO; CONSTRUCTION & GENERAL  
LABORERS LOCAL No. 85, INTERNATIONAL  
HOD CARRIERS, BUILDING & COMMON  
LABORERS' UNION OF AMERICA, AFL-CIO;  
and PLUMBERS & STEAMFITTERS LOCAL  
No. 481, UNITED ASSOCIATION OF JOURNEY-  
MEN & APPRENTICES OF THE PLUMBING  
& PIPE FITTING INDUSTRY OF THE U. S.  
& CANADA, AFL-CIO,

*Respondents.*

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**BRIEF OF RESPONDENTS**

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*On Petition for Enforcement of an Order of the  
National Labor Relations Board*

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BAILEY, SWINK, HAAS, SEAGRAVES AND LANSING,  
PAUL T. BAILEY,  
RONALD B. LANSING,

617 Corbett Building,  
Portland, Oregon 97204,

*Attorneys for Respondents.*

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**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

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NATIONAL LABOR RELATIONS BOARD,  
*Petitioner,*  
v.

LANE-COOS-CURRY-DOUGLAS COUNTIES  
BUILDING & CONSTRUCTION TRADES  
COUNCIL, AFL-CIO; CARPENTERS LOCAL  
UNION No. 1273, UNITED BROTHERHOOD  
OF CARPENTERS & JOINERS OF AMERICA,  
AFL-CIO; CONSTRUCTION & GENERAL  
LABORERS LOCAL No. 85, INTERNATIONAL  
HOD CARRIERS, BUILDING & COMMON  
LABORERS' UNION OF AMERICA, AFL-CIO;  
and PLUMBERS & STEAMFITTERS LOCAL  
No. 481, UNITED ASSOCIATION OF JOURNEY-  
MEN & APPRENTICES OF THE PLUMBING  
& PIPE FITTING INDUSTRY OF THE U. S.  
& CANADA, AFL-CIO,

*Respondents.*

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**BRIEF OF RESPONDENTS**

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*On Petition for Enforcement of an Order of the  
National Labor Relations Board*

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**BRIEF OF RESPONDENTS**

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**STATEMENT OF THE CASE**

Of critical importance in the Court's consideration of  
this case, is the understanding that the Bank job and

the City Hall job (see Petitioner's Br. at pp. 2, 4) are separate incidents to be treated independently of each other. There is no proof of connection between the two jobs with reference to the activities of respondent unions or their agents.

In discussing the issue of secondary boycott *vel non* with reference to the Bank job, it should be stated at the outset that there is absolutely no proof or evidence in the transcript or file pertaining to the following respondent unions or their agents: (1) Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council, AFL-CIO (hereinafter called "Council"); (2) Carpenters Local Union No. 1273 (hereinafter called "Carpenters"); (3) Construction and General Laborers Local No. 85, International Hod Carriers, Building & Common Laborers Union of America, AFL-CIO (hereinafter called "Laborers"). Petitioner implicitly concedes this fact (Petitioner's Br. at pp. 2, 4). Likewise with reference to the City Hall job, there was no relevant evidence adduced concerning any activities of the respondent Plumbers & Steamfitters Local No. 481 or any of its agents (hereinafter called "Plumbers").

Of questionable tactic in this matter, therefore, is the action of the Board in grouping in one proceeding *separable* labor organizations as respondents concerning *separable* activities (approximately five months apart) on two *separate* jobs under three *separate* charges, the only connection between these separable elements being the identity of the primary disputant who is the Charging Party, Ramsey.

Respondents, therefore, urge that the Court weigh the evidence in this case and reach separate decisions thereon as to whether *each* of said respondent unions deserves the imposition of Petitioner's broad order.

### **Bank Job:**

Testimony with reference to the Bank job came from essentially three witnesses, Stuart Kidd, Arthur V. Pullen and Raymond Edward Quick. Their combined testimony concerns the activity of *only* the respondent Plumbers.

Mr. Stuart Kidd, an official of the United States National Bank, testified that on or about August 21, 1963, he was informed that the plumber employees had left the construction site (Tr. 32).<sup>1</sup> The next day Mr. Kidd had a conference with Mr. Ramsey and instructed Mr. Ramsey to leave the job (Tr. 37-38). Mr. Ramsey did leave the job, and then Mr. Kidd so informed Mr. Carmickle, the Plumber's representative (Tr. 39). Subsequently the Plumbers did return to work (Tr. 39-40).

Mr. Arthur V. Pullen, another bank official, testified that on or about August 20 or 21, 1963, he received a telephone call from someone purporting to be Mr. Carmickle. Pullen testified that he received a telephone call from Mr. Carmickle.

The caller informed Mr. Pullen that the plumbers "were off the job" and that they would not return until the non-union personnel (Ramsey) had left the

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<sup>1</sup> The information passed by Pullen to Kidd was that the Plumbers "had gone on sick" (Tr. 32). Kidd further testified that neither Carmickle or any other union representative ever attempted to remove Ramsey from the job (Tr. 40).



job site (Tr. 44-45). Mr. Pullen was certain that Mr. Carmickle had said that the "men were off the job" rather than Mr. Carmickle having said that "he [Carmickle] would pull the men off the job" (Tr. 43-45, 47).

Mr. Raymond Edward Quick, a journeyman plumber who was working at the job site, testified that he left work at the Bank job in order to satisfy his own conscience; he chose not to work on the same job with men who were doing the same kind of work that he was, yet receiving less wages and conditions (Tr. 54). There was nothing in his testimony to indicate he was being urged to leave the job by the union or Mr. Carmickle. The foregoing then is the primary testimony and evidence elicited by the Petitioner in an attempt to substantiate its charge that the Plumbers were encouraging a work stoppage and had coerced the United States National Bank by threat of such work stoppage, all with an object of having persons cease doing business with Ramsey.

#### **City Hall Job:**

Testimony of the following individuals in the transcript all refer to the City Hall, and *only the City Hall*, job: Gale Roberts, William Brown, Jr., Robert B. Magee, Arlie W. Clement, Harold Stevenson, Jack C. Maycumber, Glen Randall, Kenneth A. Burton.

Mr. Gale Roberts, who was the general contractor on the City Hall job and who had subcontracted the sprinkler system construction to Ramsey (Tr. 58), did not testify at any time that respondent unions specifically

threatened to strike or put work stoppage on Robert's own operation. He did testify of several meetings with union representatives (Tr. 58-65), but at no time did those representatives ever threaten him or attempt to coerce him by use of improper secondary boycott means. He did testify that a picket was placed on the City Hall job (Tr. 66). The language on the placard stated,

"RAMSEY-WAITE CO.  
WORKING CONDITIONS

Less than enjoyed by Plumbers Union No. 481.

No other dispute exists on this job."

William Brown, Jr., and Robert B. Magee were union *laborers* working on the City Hall job for Mr. Roberts; Arlie W. Clement, Harold Stevenson and Jack C. Maycumber were all union *carpenters* working on the City Hall job for Mr. Roberts. The testimony of these five men indicates the following:

On or about January 14, 1964, the aforesaid picket was placed on the City Hall job (Tr. 72, 88, 103, 111, 117). The employees did not know at first what to do with reference to this picket (Tr. 72). Some of them telephoned or went to the Labor Temple and talked to their respective Carpenter or Laborer representatives (Tr. 72, 74, 88-89, 112). The advice given the employees by these representatives was that they (the representatives) could not advise the employees as to whether or not to cross the picket line (Tr. 98, 99, 100, 112), but rather the decision *had to be made individually by each of the employees* (Tr. 73, 75, 89, 104, 112, 118); *that no fines would be imposed by the unions for crossing*

*the picket lines* (Tr. 75, 90). Consequently, the employees did go back to work (Tr. 75, 90, 104, 112, 118). The picketing continued (Tr. 76, 90). A few days later, a meeting was called at 4:30 in the afternoon at the Labor Temple (Tr. 76-77, 91, 104). The meeting was called primarily by the Carpenters for the carpenter employees (Tr. 118, 131). Mr. Barton of the Laborers brought some of the laborer employees to that 4:30 meeting (Tr. 77, 92). The Plumbers were not represented or present.

Mr. Glenn E. Randall, as Business Agent for the Carpenters (Tr. 127), testified that the reason the meeting was called was that he and the other union representatives were receiving numerous calls from the different employees and the different crafts working at the City Hall job as to what they should do with reference to the picket (Tr. 138, 140-41). Mr. Randall testified that his advice had always been that the matter would have to be a matter of individual choice on the part of the individuals (Tr. 133). He repeatedly told them that he was unable to tell them whether or not to go through the picket line (Tr. 133). Nevertheless, he did receive questions as to what the fines or what consequences might ensue if the picket were not observed (Tr. 133-34). Consequently, the meeting was called to give the employees the facts as he, Mr. Randall, knew them.

In answer to questions and to assist the employees in making their individual decisions, Mr. Randall pointed out certain rules and regulations existing in the Constitution (Tr. 133). He read to the employees the appropriate portions in the Constitution with reference to

finances and disciplinary measures that might be enforced against employees who cross picket lines (Tr. 133). He did not tell them that these fines would be enforced inasmuch as he did not know and could not state what would happen to the employees if they did go through the picket line (Tr. 134). To the questioning of the employees, he did answer that it was his obligation to inform the international office of the Union of the facts, including the names of those who did cross the picket line (Tr. 134). Again, when asked, Mr. Randall informed them that the amount of a fine, if it would be imposed, to his knowledge and experience, had been on one occasion a full day's pay (Tr. 134). He did point out to the employees that the reason the meeting was called was that there was obvious confusion and misunderstanding, and that he simply wanted to inform them of the facts as he understood them and to clarify the situation (Tr. 131, 132, 135, 140). He did not at this meeting direct anyone to engage in a work stoppage (Tr. 132, 133, 137).

Mr. Kenneth Barton, Business Agent of the Laborers, was also at that 4:30 meeting, and in response to questions from the employees, he stated that he did not know if the employees would be reprimanded or disciplined by the union for crossing the picket line, that all he could do was quote from the Constitution, that he had no right to pass any judgment on it, and that it would become a matter for the executive board of the Union (Tr. 147). Mr. Barton likewise confirmed the statements of Mr. Randall in his testimony.

Certain of the employees also testified that following the 4:30 meeting, they did not return to work the next day (Tr. 81, 95, 121); that their choice not to go to work was individually made (Tr. 83, 121); and no one directed them or threatened them to reach this decision (Tr. 85, 99, 100, 121).

### **SPECIFICATION OF ERROR NO. 1**

It was error for the Trial Examiner to find and conclude and for the Board to approve the finding and conclusion that respondent Plumbers violated § 8(b)(4) (i)(ii)(B) of the Act at the Bank job.

#### **Argument Re: Specification of Error No. 1**

Regarding the Bank job, Petitioner does not contend, the trial examiner did not find, and there is no evidence to support a violation of the Act by the Council, the Carpenters, or the Laborers.

With reference to the Plumbers Union and Mr. Carmickle, the Plumbers' Agent, while there was testimony that the Bank ceased doing business with Ramsey and discharged Ramsey under its direct contract with the Bank, there was no proof that the Plumbers encouraged this or that it was an object of union activity. And it is important to keep in mind at this point that "an object" means something more than a mere hope or expectation.<sup>2</sup>

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<sup>2</sup> "But hope and objective cannot be equated. Unions, like many other organizations, may hope for many things without making those things objects of their programs. Men have many



Furthermore, the outward effect of the union's activities is not controlling; it is the reasons or purposes for the union activity which are controlling. *Schauffler v. Local 30, Roofers*, 191 F. Supp. 237, 244 (D.C. Del. 1961). Counsel for the Board agrees that success in the union's activity makes no difference (Tr. 152).

In other words, it is not sufficient to merely prove or infer that the Plumbers hoped or expected that a work stoppage might occur on the Bank job, nor is it enough to show simply that the work stoppage did occur on account of the union activity. What is important to show by the evidence is that, underlying the work stoppage, there existed a conscious purpose and object on the part of the Plumbers to effect the Bank's discharge of the Ramsey contract.

The most that can be said is that certain of the plumber employees on the Bank job took individual voluntary action in refusing to work with the Ramsey non-union employees. And a boycott is not illegal where engaged in by an employer or an employee voluntarily and independently of union activity. *Local 1976, Carpenters & Joiners v. NLRB*, 357 U.S. 93 (1958) (The "Sand Door" case). Union activity combined with an object designed to create the illegal effect (that is, a secondary boycott) is necessary.

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hopes which are not objectives of action. If the statutory clauses here involved [8(b) (4) (B), LMRA] were to be interpreted as forbidding any strike in which a labor organization hoped that another employer would cease doing business with the primary employer, almost all strikes would be outlawed \* \* \*." *Seafarers Internat'l Union v. NLRB*, 265 F.2d 585, 592 (D.C. Circ. 1959). Accord: *United Steelworkers of America, Loc. 4203 v. NLRB*, 294 F.2d 256, 259 (D.C. Circ. 1961); *NLRB v. Loc. 50, Bakery Union*, 245 F.2d 542, 548 (2d Circ. 1957).



Basically, Petitioner and the Charging Party rely upon two instances in the testimony to substantiate secondary boycott against the Plumbers.

The first concerns the telephone call to Mr. Arthur Pullen, a bank official. Petitioner urges this Court to accept the fact that Carmickle told Pullen that *Carmickle* "had pulled the men off the job" (Petitioner's Br. at pp. 4, 10). An examination of the whole record, however, indicates that Pullen corrected his testimony to reflect that Carmickle had only said that the "men were off the job". The testimony of Pullen was this:

"A. \* \* \* [Carmickle] said that the Union was pulling the men off the job — or had pulled the men off the job \* \* \* because of the employment of a non-union firm, which he identified as Ramsey-Waite. \* \* \*

Q. Now, are you sure of that — which was it; did he say that he was going to pull them off or he had pulled them off?

A. Well, I'm not exactly sure. At that time I think he said that they *had been removed* from the job.

\* \* \* \* \*

Q. *Did the caller ask you to do anything?*

A. *No.*

\* \* \* \* \*

Q. Now, returning to the first call on the day previous, I want you to think real hard and see if you can't remember for sure what was said about whether the men were off or would be off?

A. I'm pretty sure they said that the job was — *the men were off the job.*

Q. Did Mr. Carmichael ever use the phrase, 'We'll have to pull the men off the job'?

MR. BAILEY: I am going to object to this. The witness has testified as to what he has said, and that he said *the men were off*.

\* \* \* \* \*

MR. NELSON: I am going to exhaust his recollection first, Your Honor.

THE COURT: Well, he has answered your questions twice, and they have been *adverse to your position*." (Tr. 43-46) (Emphasis added)<sup>3</sup>

Is it likely that Carmickle would have pulled the men off the job and then called the Bank to induce a boycott? Is it likely that Carmickle would have had an illegal object in making the call and yet not have asked Pullen to do anything? Hardly.

If a union-induced boycott is the object of Carmickle's actions, then logically, at least at first, he would have forewarned the Bank by threatening the Bank that the "men *would be* pulled off the job" in the future and would have insisted that Ramsey be removed from the job. The testimony is that Carmickle informed Pullen that the men "*were off the job*" and that Carmickle did not ask Pullen to do anything.<sup>4</sup>

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<sup>3</sup> Mr. Kidd, another Bank official, affirms the fact that the Carmichael phone call to Pullen did not indicate that Carmichael had pulled the men off the job, but rather that "there were plumbers that had gone on sick" (Tr. 32).

<sup>4</sup> Likewise Mr. Kidd testified that at no time did Mr. Carmickle or any other representative of the Plumbers attempt to remove Ramsey from the job (Tr. 40).

In short then, the express evidence is that the Plumbers never stated or requested that Ramsey be removed from the job. Without such an attempt or request, there could not have been a threat or coercion within the Act's contemplation of those terms.

"[U]nder the circumstances disclosed, including the denial by the [secondary employer] that he had been threat-

The District Court judge was correct: the testimony was adverse to petitioner's position.

In this latter connection, it should also be remembered that there is a difference between threats, coercion and restraint on the one hand and mere argument, persuasion and relation of existing facts on the other. The secondary boycott provisions of the Act were not intended to sever the lines of communication between union officials and neutral employers or persons who have contracted with non-union employers. On the contrary, it is the policy of all the federal labor statutes to encourage the dialogue between labor and management. Accordingly, unions are allowed to attempt to *persuade* secondary employers or persons to cease doing business with non-union employers. *Electrical Workers Union Loc. 38 (Hoertz Elec.)*, 138 NLRB 17 (1962); *Local 1976, Carpenters & Joiners*, 357 U.S. 93, 99 (1958).

The second instance in the testimony wherein petitioner seeks to substantiate a secondary boycott charge against the Plumbers concerns Mr. Carmickle's visit to the Bank job site. Here, Petitioner would have us leap the chasm between insinuation and truth. From the bare testimony that Carmickle asked Quick of the whereabouts of the Ramsey employees and then indicated there would be a meeting between union officials and Ramsey and the general contractor, Petitioners would have this Court affirm a conclusion that Quick

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ened in any way by the union's business agent or any other union representative, insufficient basis existed for a finding that the union had violated Section 8(b)(4)(B), as alleged." Administrative Decision of General Counsel, Case No. SR-996, 1960 CCH NLRB Par. 9386.

and another plumber, Dallas, left the job because Carmickle affirmatively induced and encouraged them to do so. Petitioner would have the Court affirm this breach of logic even in the face of the express statement of Quick as to why he left:

“[I] chose not, in order to satisfy my own conscience, to work with people who were doing the same kind of work I am and receiving less wages and conditions.” (Tr. 54)

The Courts of this nation are conscious of the difference between mere conjecture and competent evidence. There shall be no legal guilt established without proof of facts. To speculate, to surmise, to conjecture, is not sufficient at the law. Imagination has not yet taken the place of competent testimony.

## **SPECIFICATION OF ERROR NO. 2**

It was error for the Trial Examiner to find and conclude and for the Board to approve the finding and conclusion that respondent Plumbers violated § 8(b)(4)(i)(ii)(B) of the Act at the City Hall job.

### **Argument Re: Specification of Argument No. 2**

The evidence shows that the only conduct of the Plumbers regarding the City Hall job was the placing of a picket at the City Hall site and the conversations between Carmickle and the general contractor Roberts and certain other union officials which occurred in September 1963 and on January 13, 1964 (Petitioner's

Br. pp. 4, 5). There is no contention by Petitioner or the Charging Party that this conduct violated the Act. The Petitioner's major thrust for violation of the secondary boycott provisions at the City Hall job is directed at the January 16, 1965 meeting at the union hall. The Plumbers were not present at the meeting (Petitioner's Br. pp. 6, 7; Charging Party's Br. 6). There is simply no evidence to support a finding of violation by the Plumbers at the City Hall job.<sup>5</sup>

### **SPECIFICATION OF ERROR NO. 3**

It was error for the Trial Examiner to find and conclude and for the Board to approve the finding and conclusion that respondent Council, Carpenters and Laborers violated § 8(b)(4)(i)(ii)(B) of the Act at the City Hall job.

#### **Argument Re: Specification of Error No. 3**

With reference to the City Hall Job, the choices of the men not to work while Ramsey was performing work on the job site were individually made and were not the product of coercion or encouragement by the respondent

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<sup>5</sup> The Charging Party, at pp. 13-14 of his brief, attempts to hold the Plumbers in violation upon some theory of agency or joint venture. There is no evidence or facts in the record to substantiate such a theory, and the Charging Party cites no page in the record in support thereof. Furthermore, the case cited by the Charging Party in support thereof is not apposite: *Retail Clerk Union (Retail Fruit Dealers' Ass'n)*, 116 NLRB 856 (1956) *enf'd* 249 F.2d 591 (9th Circ. 1957). In the latter case, there was one union official who was in fact representing two local unions and the proof was clear that his actions were authorized by both unions. *Id.* 249 F.2d at 598.



unions or their agents. The activity on the part of the unions which is under attack concerning the City Hall job is the January 16, 1965 meeting at the union hall at which time facts were reported to the employees upon the request of the employees as a product of their confusion. The respondent unions and their agents at all times made it clear to the employees that the decision had to be individually made, that the unions were not authorizing or instructing any strike or work stoppage. Rather, as a result of a natural curiosity and investigation of the facts by the employees, the agents of the Council, Carpenters, and Laborers did inform the employees of the provisions in the respective union Constitutions, which might or might not be pertinent, and also the fines indicated in said provisions, which might or might not be imposed. The union agents did not frankly know what the consequences would be. Many judges and courts in this nation have been in a similar quandry.

In *Building & Construction Trades Council of Tampa*, 132 NLRB 1564 (1961), union officials made remarks to the membership at a union meeting, telling them that it was legal for each employee to individually decide to stop work for a secondary employer, that the choice was up to them, that they could not be discriminated against if they so decided. It was held that this did not constitute illegal secondary boycott.

"To read inducement and encouragement into the mere statement that the men could make an individual choice as to handling Cone products is to attach a presumption of guilt to a declaration of



what the law will permit. This, we think, carries the 'nod, wink, and smile' theory too far. The law does not require that a union refrain from making the law known to its members. \* \* \*'' *Ibid.*

Any statements made by Mr. Joseph Willis, Secretary of the Oregon State Building & Construction Trades Council (Tr. 135, 143), who was also present at the January 16 meeting, are immaterial to the matters to be determined here inasmuch as the Oregon State Building Trades is not a respondent union in this matter (Tr. 136) and has not been charged with secondary boycott violation by the Board. Anything stated by Mr. Willis likewise does not have any bearing on the charges brought against the unions made respondents here, inasmuch as there is no evidence (and Petitioner cites no page of the record) which would show that Willis was the authorized agent of any of the respondent unions.

If the unions or the agents hoped or expected the employees to cease work, that mere hope and expectation is not material to the issues in this cause. *United Steelworkers of America, Local 4203 v. NLRB*, 294 F.2d 256, 259 (D.C. Circ. 1961); *Seafarers International v. NLRB*, 265 F.2d 585, 591-92 (D.C. Circ. 1959); *NLRB v. Local 50, Bakery*, 245 F.2d 542, 548 (2d Circ. 1957). Likewise, the fact that a work stoppage did occur is not pertinent to the issues in this cause inasmuch as it is not the effect of the union activity that we are seeking but rather its reasons and purposes. *Schauffler v. Local 30, Roofers*, 191 F. Supp. 237, 244 (D.C. Del. 1961); *Cuneo v. Hod Carriers, Local 472*, 175 F. Supp. 131, 135 (D.C. N.J. 1959).

## SPECIFICATION OF ERROR NO. 4

It was error for the Trial Examiner to recommend an order and for the Board to approve an order, which was too broad and extended beyond that which was warranted by the evidence.<sup>6</sup>

### Argument Re: Specification of Error No. 4

It is respondent's contention that the cease and desist order, if it is to be enforced at all, cannot stand in its broad form. Insofar as the order does pertain to "any other employer" or to "any other person", it is too broad.

This Court has analyzed the issue of the "broad order" at depth in *NLRB v. Ass'n. of Journeymen Plumbers, Local 469*, 300 F.2d 649 (9th Circ. 1962). In the latter case the NLRB was given the choice of either narrowing its broad order or initiating further proceedings to take evidence which would establish the necessity for a broad order. *Id.* at 654.<sup>7</sup>

The evidence does not warrant the conclusion that the respondent's inclination was to extend any alleged,

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<sup>6</sup> The order is printed in Appendix "A" hereto.

<sup>7</sup> In said case this Court quotes with approval the language of the United States Supreme Court:

"It would seem \* \* \* clear that the authority conferred on the Board to restrain the practice which it has found \* \* \* to have [been] committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct. [Citing Cases]" *Communications Workers of Amer. v. NLRB*, 362 U.S. 479, 480-81 (1960).

unlawful activity actually found to have been committed.

*United Steel Workers of America, Local 4203 v. NLRB*, 294 F.2d 256, 260 (D.C. Circ. 1961) (order must "correspond to the violations actually found to have been committed");

*NLRB v. Hod Carriers*, 285 F.2d 397, 404-405 (8th Circ. 1960) (evidence did not warrant order extending to "any other employer" or "person");

*NLRB v. Bangor Building Trades Council*, 278 F.2d 287, 291 (1st Circ. 1960) (no evidence that union inclination was to extend to unlawful activity).

## CONCLUSION

Respondents respectfully submit that Petitioner's cease and desist order be denied.

BAILEY, SWINK, HAAS, SEAGRAVES  
AND LANSING  
PAUL T. BAILEY  
RONALD B. LANSING

**CERTIFICATE OF COUNSEL**

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RONALD B. LANSING,  
Of Attorneys for Respondent.



## APPENDIX A

The following is the cease and desist order which Petitioner seeks to enforce against the Plumbers:

“Cease and desist from inducing or encouraging any individual employed by Stimson or Roberts *or any other employer or person engaged in commerce, or in any industry affecting commerce*, to engage in a strike or a refusal in the course of his employment to perform any services for his employer, and from threatening, coercing or restraining the Bank or Roberts *or any other persons engaged in commerce or in an industry affecting commerce* where an object in either case is to force or require the Bank or Roberts *or any person* to cease doing business with Ramsey.” [Emphasis added]

The following is the cease and desist order which Petitioner seeks to enforce against the Carpenters, the Laborers and the Council:

“Cease and desist from inducing or encouraging any individual employed by Roberts, *or any other employer or person engaged in commerce, or in an industry affecting commerce*, to engage in a strike or refusal in the course of employment to perform any services for his employer, and from threatening, coercing or restraining Roberts *or any other person engaged in commerce or in an industry affecting commerce* where an object in either case is to force or require Roberts *or any person* to cease doing business with Ramsey.” [Emphasis added]





**In the United States Court of Appeals  
for the Ninth Circuit**

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**NATIONAL LABOR RELATIONS BOARD, PETITIONER**

*v.*

**LANE-COOS-CURRY-DOUGLAS COUNTIES BUILDING &  
CONSTRUCTION TRADES COUNCIL, AFL-CIO; CAR-  
PENTERS LOCAL UNION No. 1273, UNITED BROTH-  
ERHOOD OF CARPENTERS & JOINERS OF AMERICA,  
AFL-CIO; CONSTRUCTION & GENERAL LABORERS  
LOCAL No. 85, INTERNATIONAL HOD CARRIERS,  
BUILDING & COMMON LABORERS' UNION OF AMERI-  
CA, AFL-CIO; and PLUMBERS & STEAMFITTERS  
LOCAL No. 481, UNITED ASSOCIATION OF JOURNEY-  
MEN & APPRENTICES OF THE PLUMBING & PIPE  
FITTING INDUSTRY OF THE U.S. & CANADA, AFL-  
CIO, RESPONDENTS**

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**On Petition for Enforcement of An Order of the  
National Labor Relations Board**

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**BRIEF FOR THE NATIONAL LABOR RELATIONS  
BOARD**

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**FILED**

OCT 13 1965

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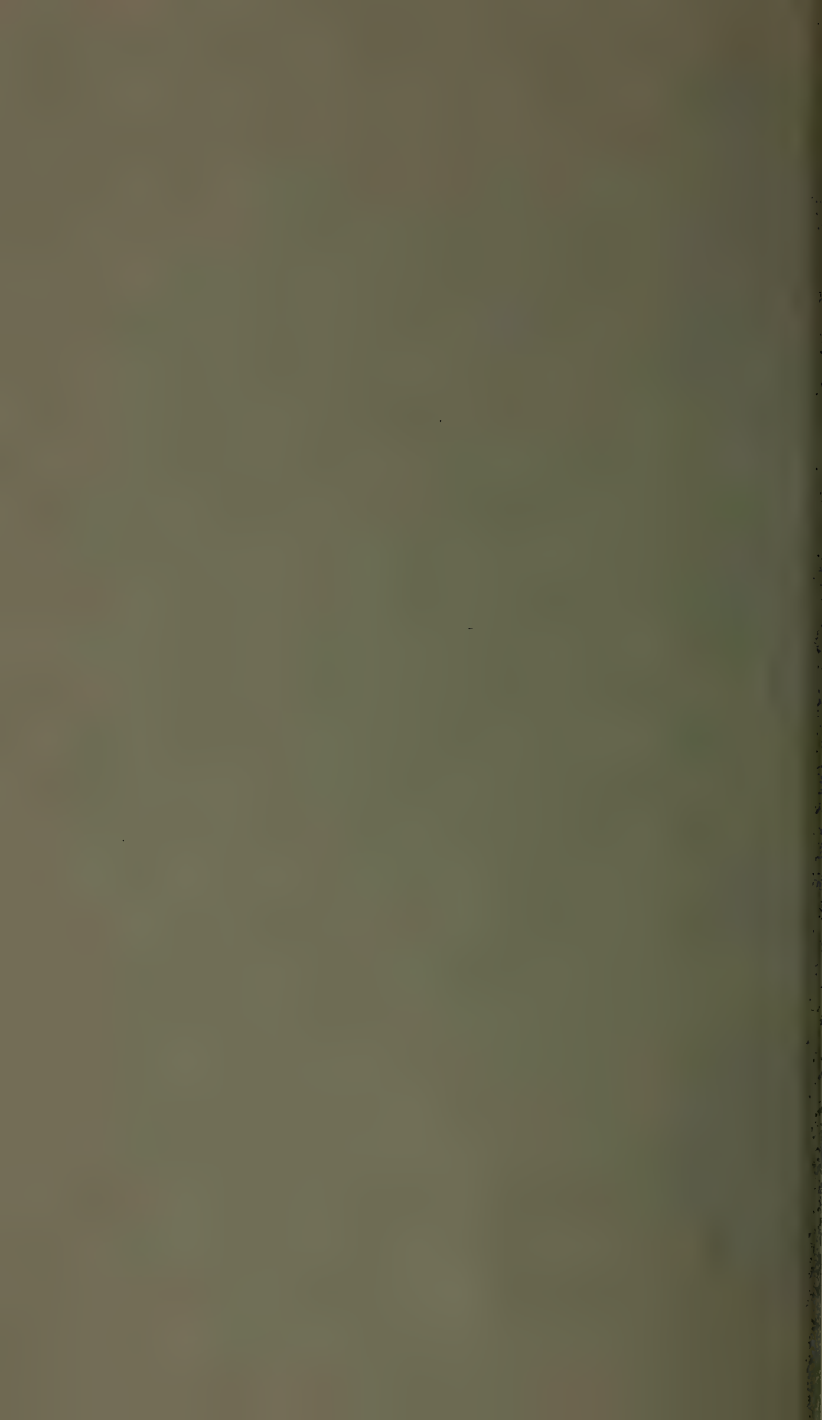
ARNOLD ORDMAN,  
*General Counsel,*

DOMINICK L. MANOLI,  
*Associate General Counsel.*

MARCEL MALLET-PREVOST,  
*Assistant General Counsel,*

GLEN M. BENDIXSEN,  
*Attorney,*  
*National Labor Relations Board.*

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**In the United States Court of Appeals  
for the Ninth Circuit**

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No. 20291

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

LANE-COOS-CURRY-DOUGLAS COUNTIES BUILDING & CONSTRUCTION TRADES COUNCIL, AFL-CIO; CARPENTERS LOCAL UNION No. 1273, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL-CIO; CONSTRUCTION & GENERAL LABORERS LOCAL No. 85, INTERNATIONAL HOD CARRIERS, BUILDING & COMMON LABORERS' UNION OF AMERICA, AFL-CIO; and PLUMBERS & STEAMFITTERS LOCAL No. 481, UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPE FITTING INDUSTRY OF THE U.S. & CANADA, AFL-CIO, RESPONDENTS

---

**On Petition for Enforcement of An Order of the  
National Labor Relations Board**

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**BRIEF FOR THE NATIONAL LABOR RELATIONS  
BOARD**

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**JURISDICTION**

This case is before the Court upon the petition of the Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Secs. 151, *et seq.*),<sup>1</sup> for enforce-

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<sup>1</sup> Pertinent provisions of the Act are set forth *infra*, pp. 16-18.

ment of its order, issued against respondents on March 10, 1965 (R. 28-38, 44-45),<sup>2</sup> and reported at 151 NLRB No. 63. This Court has jurisdiction of the proceedings, the unfair labor practices having occurred during a labor dispute between respondents and Ramsay-Waite Co., Inc., (herein called Ramsey) an employer doing business in interstate commerce in Eugene, Oregon. No issue of the Board's jurisdiction is presented.

## STATEMENT OF THE CASE

### I. The Board's Findings of Fact

The Board found that respondents violated Section 8(b)(4)(i) and (ii)(B) of the Act by inducing and encouraging individuals employed by neutral and secondary employers to cease performing services, and by threatening, coercing, and restraining the neutral and secondary employers, all with an object of forcing those employers to cease doing business with Ramsey. The evidence upon which the Board based its findings is summarized below.

#### *A. Respondent Plumbers' conduct at the Bank jobsite*

Respondents Carpenters, Laborers, and Plumbers are constituent members of respondent Council (R. 11).

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<sup>2</sup> References designated "R." are to Volume I of the record as reproduced pursuant to Rule 10 of this Court. References designated "Tr." are to the reporter's transcript of testimony as reproduced in Volume II of the record. Whenever in a series of references a semicolon appears, those preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

Ramsey installs irrigation and sprinkling systems. Ramsey is a nonunion contractor involved in a labor dispute with the Plumbers and the Council, Ramsey having rejected their request for a union contract and his employees having rejected them as their bargaining representative (R. 11, 21-22, 29; Tr. 12). In August 1963 Ramsey was performing a contract for the United States National Bank ("Bank") at its building in Eugene. Gale M. Roberts Co. ("Roberts") is a general contractor who was also engaged at the Bank. Roberts' employees are represented by respondents. Roberts' subcontracted his plumbing and steam-fitting work to Stimson Plumbing & Heating Co. ("Stimson"), a plumbing subcontractor whose employees are represented by respondent Plumbers (R. 30; Tr. 35-36).

On August 20, 1963, Plumbers' business manager, Mark Carmickle, came to the jobsite and asked a Stimson plumber, employee Raymond Quick, if Ramsey employees were on the job. When Quick said they were, and indicated their location, Carmickle left (R. 30; Tr. 48-51, 55-56). Carmickle returned shortly and told Quick that some of the labor officials were going to meet with Roberts and Ramsey that afternoon. Carmickle did not state the purpose of the meeting, but Quick "knew what it was for" (R. 30; Tr. 51-52). After lunch Quick and the other Stimson employee on the job, Warner Dallas, walked off the job (R. 30; Tr. 52-54).

Sometime that same afternoon Carmickle called the Bank, and spoke to Assistant Cashier and Loan Officer Arthur Pullen. Carmickle told Pullen that he had

“pulled the men off the job . . . because of the employment of a non-union firm . . . Ramsey.” Later that afternoon Pullen passed this information on to the Bank’s building and planning manager, Stuart Kidd (R. 30; Tr. 42-44).

The next morning Carmickle called Assistant Cashier Pullen again, and told him that as the “non-union personnel” were not yet off the job, the “Union men” would not return (R. 30; Tr. 44-46). That morning, however, Bank Manager Kidd met with Taylor Ramsey at the jobsite and directed him to remove Ramsey’s employees. Ramsey did so (R. 30; Tr. 31-38). A few minutes later Kidd encountered Carmickle at the site. Kidd told him that he had done what was necessary “to eliminate the confusion at the job,” and hoped that Stimson’s “plumbers would return immediately.” Within half an hour they were back on the job (R. 30; Tr. 38-40).

#### *B. Respondents’ conduct at the City Hall jobsite*

In 1962 Roberts was awarded a contract for construction of a city hall in Eugene. He subcontracted the installation of a sprinkler system to Ramsey (R. 31; Tr. 17-18, 22-23, 57-58).

In September 1963, several months before Ramsey began work (and a few weeks after respondents had forced Ramsey’s removal from the Bank job, as described in section A, above), Business Manager Carmickle and the secretary of the Council, Jens Horstrup, talked to Roberts concerning the use of Ramsey on the City Hall job. The union officials told Roberts that Ramsey was not hiring union men and that

he was refusing to sign a contract with the Plumbers. They sought Roberts' "help," but the latter stated he had a binding contract with Ramsey (R. 31; Tr. 58-60, 141-142). About a month later Roberts sought out Carmickle and suggested a means for Ramsey working on the site without Carmickle objecting. Roberts proposed that the dispute between the Plumbers and Ramsey be settled by Ramsey agreeing to hire "all Union help." Carmickle rejected the proposal (R. 31; Tr. 60-62).

On January 13, 1964, Ramsey's employees began work at the City Hall site. Carmickle, Council Secretary Horstrup, and one or two other unidentified union officials came to the site. They again complained to Roberts about the presence of Ramsey. Roberts, however, reiterated that he had a binding contract with Ramsey. Horstrup said he would "think about" the matter. Carmickle said he was going "to do something about it." The union officials then left (R. 31; Tr. 62-65).

The next day, January 14, 1964, a picket appeared at the City Hall site, carrying a sign which read (R. 13, 21, 32; Tr. 24-25, 65-66):

RAMSEY-WAITE CO. WORKING CONDITIONS less  
than enjoyed by Plumbers Union # 481. No  
other dispute exists on this job

Business Agent Carmickle requested and obtained the Council's approval of the Plumbers' picketing (R. 32; Tr. 129-130).

Roberts' employees, members of either the Laborers or Carpenters, gathered at the jobsite after seeing



the picketing. On behalf of the laborers, employee and member Robert Magee telephoned Laborers' Business Agent, Kenneth Barton, for advice. Barton told Magee that the picketing was "informational" and that any decision to leave work was up to the individual (R. 32; Tr. 71-73, 87-89). The laborers started to work, but grew uneasy and called Barton again. He told them to come to his office, where they all went. Council Secretary Horstrup was present. Horstrup told the laborers that any "decision" was left to them and that the union would not take any action against anyone who went through the picket line. The laborers then went back to work (R. 32; Tr. 73-76, 89-91).

As the carpenters were gathered at the site, Glen Randall, Carpenters business representative and Council president, appeared. The carpenters asked him what they should do. Randall replied that the picketing was "legal," and that he could not tell them what to do, that they should decide for themselves. After some discussion among themselves, the carpenters went to work (R. 32; 66-67, 102-104, 111-113, 141).

Because Roberts' employees had continued to work behind the picket line, respondents withdrew it at about noon, January 15 (R. 13, 21, 32). The next morning, January 16, Randall told Roberts' superintendent, Jay Maycumber, that he wanted to meet with the carpenters that afternoon, after work. Maycumber, a Carpenters' member, so notified the men (R. 32; Tr. 116-119). The laborers learned of this, and after work went to Business Agent Barton's office. Barton took them to the room in the union hall where the meeting was about to open. Already present when

Barton and the laborers arrived, were Roberts' carpenters, Carpenters' Business Representative and Council President Randall, and Joe Willis. Willis is secretary of the Council's parent body, the Oregon State Building Trades Council (R. 32; Tr. 77-78, 82-84, 91-93, 96, 143).

After explaining why a tape recorder would be on during the meeting, Randall spoke to the employees concerning the picketing. He told them that the picket line would be re-established the next morning. Randall stated that he had a list of all the carpenters on the job and that if the men did not cross the picket line, the list would be forgotten. He also stated that nothing would be done about the carpenters who had worked throughout the picketing on January 14 and 15, if they now refused to work behind the newly established picket line. Randall reminded the employees of the provisions in the Carpenters' constitution providing for "fines" and other punishment for disregarding a picket line, and that he was obligated to bring "charges" with the Council for violations thereof (R. 33; 78-80, 93-94, 104-107, 113-114, 119-122, 130-135).

Laborers Business Agent Barton then reminded the laborers that their constitution provided for punishment of members who disregarded a picket line. Barton added that any accused member had a right to a "trial" (R. 33; Tr. 144-149).

In addition, Willis, secretary of the State Council, told the employees that he would not cross the picket line and that he thought Randall had been "pretty nice" for not seeking Council punishment for those

who had crossed the line of January 14 and 15 (R. 33; 80, 94, 114-115, 143).

The next morning the picketing recommenced, and Roberts' employees remained away from work. They did not return until 2 weeks later, when Ramsey's employees left the City Hall jobsite. Officials of both the Carpenters and the Council acted as pickets during the 2 week period <sup>3</sup> (R. 33; Tr. 81, 84-85, 94-95, 107, 115).

## II. The Board's Conclusions and Order

The Board found that respondent Plumbers induced and encouraged Stimson's employees to withhold their services, and threatened, coerced and restrained the Bank, all with an object of forcing the Bank to cease doing business with Ramsey at the Bank jobsite, in violation of Section 8(b)(4)(i) and (ii)(B) of the Act (R. 31, 44-45). The Board further found that respondents induced and encouraged Roberts' employees to withhold their services, and coerced and restrained Roberts, all with an object of forcing Roberts to cease doing business with Ramsey at the City Hall jobsite, in violation of Section 8(b)(4)(i) and (ii)(B) of the Act (R. 33-35, 44-45). The Board's order requires respondents to cease and desist from the

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<sup>3</sup> After issuing an unfair labor practice complaint against respondents, the Board's Regional Director sought interim relief in the federal district court, pursuant to Section 10(1) of the Act. On April 7, 1964, after hearing, the district court in Oregon granted a temporary injunction. Before the Board the parties waived hearing and stipulated that the Trial Examiner would consider as the evidence the testimony in the district court proceeding (R. 26-28).

unfair labor practices found and to post the customary notices (R. 34-38, 45).

## ARGUMENT

### **Substantial Evidence Supports the Board's Finding That Respondents Violated Section 8(b)(4)(i) and (ii)(B) of the Act**

Section 8(b)(4)(i) and (ii) (B) of the Act, as amended in 1959 (see, *infra*, pp. 16-17) provides that a union may not "induce or encourage" any employee, or "threaten, coerce or restrain any person" with the object of effecting a secondary boycott. *N.L.R.B. v. District Council of Painters No. 48 and Paint Makers Local Union No. 1232*, 340 F. 2d 107 (C.A. 9), cert. denied, 381 U.S. 914. The uncontradicted evidence, set out *supra*, pp. 2-8 amply supports the finding of the Board that respondents violated both these prohibitions. Initially, the Plumbers violated the Section by the conduct of Business Manager Carmickle when he learned that Ramsey, the primary employer who had rejected the Plumbers' request for a contract and whose employees had rejected the Plumbers, was engaged at the Bank jobsite alongside union contractors. Thus, Carmickle told Quick, an employee of Stimson, that because of Ramsey's presence union officials were meeting at noon that day. After lunch, Quick and the other Stimson employee present walked off the job, Quick having surmised the purpose of the union meeting Carmickle referred to. Any doubt that Carmickle had instigated the walkout was dispelled by Carmickle's calls to the Bank that afternoon and the following morning. For Car-

mickle told the Bank that he had "pulled the men off the job." Moreover, the plain objective of this inducement of a work stoppage was to bring pressure on the Bank to cease doing business with Ramsey in furtherance of the Plumbers' dispute with Ramsey. Carmickle thus told the Bank that the reason for the stoppage was the presence of Ramsey's "non-union personnel," and within a half-hour after the Bank persuaded Ramsey to remove his employees, Stimson's plumbers returned to work. The Plumbers' violation of Section 8(b)(4)(i)(B) of the Act is, therefore, manifest. See, e.g., *N.L.R.B. v. District Council of Painters No. 48 and Paint Makers Local Union No. 1232*, *supra*, 340 F. 2d at 110-111; *N.L.R.B. v. Local 294, Teamsters*, 298 F. 2d 105, 106-107 (C.A. 2); *N.L.R.B. v. Plumbers' Union of Nassau County*, 299 F. 2d 497, 500-501 (C.A. 2); *N.L.R.B. v. Highway Truckdrivers & Helpers, Local 107*, 300 F. 2d 317, 319-320 (C.A. 3). Moreover, the application of such pressure against the Bank also falls squarely within the proscription of subparagraph (ii), the purpose of which is to foreclose threats to neutral employers of such "labor trouble and other consequences,"<sup>4</sup> and to prohibit carrying out of such threats by means of a "strike or other economic retaliation."<sup>5</sup> Cases cited, *supra*. See, in addition, *N.L.R.B. v. International Hod Carriers, Local 1140*, 285 F. 2d 397, 402-403 (C.A. 8), cert. denied, 366 U.S. 903.

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<sup>4</sup> 105 Cong. Rec. 15532, II Leg. Hist. 1568; see 105 Cong. Rec. 8874, II Leg. Hist. 1750.

<sup>5</sup> 105 Cong. Rec. 14347, 15544-15545, II Leg. Hist. 1523, 1581.



The Board had ample warrant for rejecting respondents' contention that Stimson's employees quit work on their own individual action. Though Quick testified that he left out of scruple against working with employees "receiving less wages" for the same kind of work (R. 30), Quick, as the Board noted, was not concerned about the presence of Ramsey's non-union employees until Carmickle raised the matter and implied union action against it. As this Court has recognized, "'the words 'induce or encourage' are broad enough to include in them every form of influence and persuasion.'" [citation omitted]. *N.L.R.B. v. District Council of Painters No. 48 and Paint Makers Local Union No. 1232*, *supra*, 340 F. 2d at 111. Moreover, by his own declaration that he had "pulled the men from the job" Carmickle demonstrated that it was his actions that brought about the work stoppage. In these circumstances, the Board properly placed little weight on Quick's testimony avowing wholly individual action on his part. Cf. *N.L.R.B. v. Donnelly Garment Co.*, 330 U.S. 219, 228-231; *Hendrix Mfg. Co. v. N.L.R.B.*, 321 F. 2d 100, 105 (C.A. 5).

Respondents resorted to unlawful secondary pressures in the second instance, by their conduct when they discovered that Roberts had subcontracted work to Ramsey at the City Hall jobsite.<sup>6</sup> Thus, when

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<sup>6</sup> The Board, contrary to respondents' assertion (R. 9, 19, 22-23), acted well within its broad discretion in consolidating the case against the Plumbers at the Bank site with the case against all the respondents, including the Plumbers, at the City Hall site. The Plumbers are a common respondent, and



Roberts rejected the repeated requests of the Plumbers and the Council to cancel his contract with Ramsey, the Plumbers, with the Council's official sanction, began picketing the job site. Roberts' carpenters and laborers hesitated crossing the picket line, but uniformly did so when in answer to their inquiries officials of the Carpenters, Laborers, and Council told them the decision was up to them. Significantly, the secondary employees' unanimous decision to continue working led the Plumbers and Council to withdraw the picket line on January 15.

Respondents, however, immediately took action to assure that Roberts' employees would cease working. The employees were thus assembled in the union hall immediately after work on January 16 and told by top officials of the Carpenters, Laborers, Council, and the parent State Council, that the Plumbers' picket line would be re-established in the morning. The employees were reminded that the unions' constitutions provided sanctions for disregarding a picket line. They were further told that an asserted "list" of those

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because of a dispute with Ramsey resorted to secondary activity because of his presence at both sites, enlisting the Council and other respondents (fellow Council members) in the activity at the City Hall site. Roberts is a neutral employer involved at both sites, and Ramsey is the charging party in all the charges filed against respondents. Plainly, these facts establish common parties and common issues of fact and law. Moreover, respondents have not suggested how they were prejudiced by the consolidation. *N.L.R.B. v. United Mine Workers of America, District 31, et al.*, 198 F. 2d 389, 390 (C.A. 4), cert. denied, 344 U.S. 884. Accord: *N.L.R.B. v. Local Joint Executive Board*, 301 F. 2d 149, 155-156 (C.A. 9).

who had worked behind the picketing would be forgotten if the new picket line was honored, but that those who crossed this line would be subject to "fines" and "punishment." The admonition was effective, as Roberts' employees stayed away from the jobsite and the picket line for 2 weeks, at which time Ramsey's employees left. Under settled law, respondents' picketing and threats to invoke internal union discipline to induce work stoppages among secondary employees to bring pressure on a secondary employer (Roberts) to cease doing business with the primary (Ramsey), are violative of Section 8(b)(4)(i) and (ii)(B) of the Act. *N.L.R.B. v. Local 3, I.B.E.W.*, 325 F. 2d 561, 563 (C.A. 2), and cases cited therein. Accord: *N.L.R.B. v. Local 751, Carpenters*, 285 F. 2d 633, 640, 641 (C.A. 9); *Elliott v. Amalgamated Meat Cutters, etc.* 91 F. Supp. 690, 697 (W.D. Mo.), appeal dismissed, 189 F. 2d 965 (C.A. 8); *Hull v. Sheet Metal Workers' International Association, AFL-CIO, et al.*, 41 LRRM 2812, 2820 (D.C. N. Ohio); *Truck Drivers Local Union 728, Teamsters v. N.L.R.B.*, 265 F. 2d 439, 442-443 (C.A. 5), cert. denied, 361 U.S. 917; *Roanoke Building & Construction Trade Council, AFL-CIO, et al. (The Kroger Co.)*, 117 NLRB 977, 980; *Int'l Ass'n of Heat & Frost Insulators and Asbestor Workers, et al. (Speedline Mfg. Co.)* 137 NLRB 1410, 1411. See also, *Local Union No. 789, Int'l Hod Carriers, et al. (H. E. Doyle)*, 125 NLRB 571, 573.

Accordingly, as regards the City Hall jobsite, the Board properly rejected respondents' contention that they established a picket line, at a common situs,

which was aimed solely at Ramsey and his employees and that they merely gave Roberts' employees the "facts" in response to their "confusion" as to whether to cross it. Given an opportunity, Roberts' employees did make an "individual decision," and initially continued to work in spite of the picketing. Respondent Plumbers thereupon re-established the picket line and by resort to threats of union discipline each of the other respondents induced Roberts' employees to engage in a work stoppage. Thus, to force Roberts to cease doing business with Ramsey, "there was a deliberate attempt to produce collective action by the [respondents] acting as a union but termed, for the purpose of subterfuge, individual action." *Truck Drivers Local Union 728, Teamsters v. N.L.R.B.*, *supra*, 265 F. 2d at 443. In short, respondents' assertion is foreclosed by their overt and joint effort to "enmesh . . . secondary employers and employees in the dispute." *N.L.R.B. v. Highway Truckdrivers & Helpers, Local 107*, *supra*, 300 F. 2d at 321-322. See also, *Retail Fruit & Vegetable Clerks Union Local 1017 v. N.L.R.B.*, 249 F. 2d 591, 596-598 (C.A. 9); *N.L.R.B. v. Western States Regional Council No. 3, et al.*, 319 F. 2d 655, 659 (C.A. 9); *N.L.R.B. v. Local Union No. 751, Carpenters*, 285 F. 2d 633, 639-640 (C.A. 9); *National Maritime Engineers Beneficial Assn. v. N.L.R.B.*, 274 F. 2d 167, 170 (C.A. 2); *I.B.E.W. v. N.L.R.B.*, No. 19084 (C.A. D.C.) decided July 16, 1965 (59 LRRM 2767).

## CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.<sup>7</sup>

ARNOLD ORDMAN,  
*General Counsel,*

DOMINICK L. MANOLI,  
*Associate General Counsel,*

MARCEL MALLET-PREVOST,  
*Assistant General Counsel,*

GLEN M. BENDIXSEN,  
*Attorney,*  
*National Labor Relations Board.*

October 1965.

## CERTIFICATE

The undersigned certifies that he has examined the provisions of Rule 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

Marcel Mallet-Prevost  
*Assistant General Counsel*  
*National Labor Relations Board*

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<sup>7</sup> Respondents clearly demonstrated a proclivity for bringing unlawful pressures on any secondary employers who attempt to engage Ramsey at any jobsite. Therefore, the Board, contrary to respondents' assertion, was warranted in including a provision in the order which seeks to deter respondents in the immediate future from bringing such pressures on any secondary employer who seeks to do business with Ramsey. *I.B.E.W. v. N.L.R.B.*, 341 U.S. 694, 698,699, 705-706; *N.L.R.B. v. International Union of Operating Engineers, Local 571*, 317 F. 2d 638, 643-644 (C.A. 8); *N.L.R.B. v. Local 38, IBEW*, 339 F. 2d 197, 200 (C.A. 6).

## APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

\*       \*       \*       \*

## UNFAIR LABOR PRACTICES

\*       \*       \*       \*

Sec. 8 (b) It shall be an unfair labor practice for a labor organization or its agents—

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: . . . (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make un-



lawful, where not otherwise unlawful, any primary strike or primary picketing; . . .

\* \* \* \*

## PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: \* \* \*

\* \* \* \*

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with re-



spect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record . . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

\* \* \* \*

No. 20291

In the

# United States Court of Appeals For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

vs.

LANE-COOS-CURRY-DOUGLAS COUNTIES BUILDING & CONSTRUCTION TRADES COUNCIL, AFL-CIO; CARPENTERS LOCAL UNION NO. 1273, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL-CIO; CONSTRUCTION & GENERAL LABORERS LOCAL NO. 85, INTERNATIONAL HOD CARRIERS, BUILDING & COMMON LABORERS' UNION OF AMERICA, AFL-CIO; and PLUMBERS & STEAMFITTERS LOCAL NO. 481, UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPE FITTING INDUSTRY OF THE U. S. & CANADA, AFL-CIO,

*Respondents.*

## BRIEF OF CHARGING PARTY AS AMICUS CURIAE

On Petition for Enforcement of an Order of the  
National Labor Relations Board

McCOLLOCH, DEZENDORF & SPEARS

JAMES H. CLARKE

LEWIS K. SCOTT

8th Floor, Pacific Building

Portland, Oregon 97204

*Attorneys for Ramsey-Waite Co., Inc., Amicus Curiae*

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No. 20291

In the

# United States Court of Appeals For the Ninth Circuit

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NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

vs.

LANE-COOS-CURRY-DOUGLAS COUNTIES BUILDING & CONSTRUCTION TRADES COUNCIL, AFL-CIO; CARPENTERS LOCAL UNION NO. 1273, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL-CIO; CONSTRUCTION & GENERAL LABORERS LOCAL NO. 85, INTERNATIONAL HOD CARRIERS, BUILDING & COMMON LABORERS' UNION OF AMERICA, AFL-CIO; and PLUMBERS & STEAMFITTERS LOCAL NO. 481, UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPE FITTING INDUSTRY OF THE U. S. & CANADA, AFL-CIO,

*Respondents.*

---

On Petition for Enforcement of an Order of the  
National Labor Relations Board

---

## **BRIEF OF CHARGING PARTY AS AMICUS CURIAE**

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### **STATEMENT**

This brief is submitted by the charging party, Ramsey-Waite Co., Inc., pursuant to the written consent of all parties. Rule 18(9)(a).

## QUESTION PRESENTED FOR DECISION

The question is whether there is substantial evidence on the record considered as a whole<sup>1</sup> that respondents induced strikes by neutral employees and coerced persons engaged in commerce to force them to cease doing business with the charging party, a primary employer with whom the respondent Plumbers Union had a labor dispute.<sup>2</sup>

## SUMMARY OF ARGUMENT

This is a flagrant case of unlawful secondary strike action which the evidence established beyond any doubt at all. The Plumbers Union<sup>3</sup> first required a project owner to cancel a direct contract with the charging party by threats and coercion and by "pulling" its members working for another contractor off the job. Thereafter, the Plumbers Union, the Carpenters Union,<sup>4</sup> the Laborers Union<sup>5</sup> and the Trades Council<sup>6</sup> jointly attempted to require a prime contractor to cancel a subcontract with charging party by inducing (and coercing) strike action by the prime contractor's employees.

1. 29 USC § 160(e).

2. 29 USC §158(b)(4)(i) and (ii)(B); *N.L.R.B. v. Denver Bldg. & Constr. T. Council*, (1951) 341 US 675. Respondents did not except to any of the jurisdictional findings (R 39).

3. Respondent Plumbers & Steamfitters Local No. 481.

4. Respondent Carpenters Local Union No. 1273.

5. Respondent Construction & General Laborers Local No. 85.

6. Respondent Lane-Coos-Curry-Douglas Counties Building & Construction Trades Council, AFL-CIO.

The charges were proved to the hilt, and the Board's order should be enforced.

## **ARGUMENT**

### **Introduction**

The charging party, Ramsey-Waite Co., Inc., (hereafter called Ramsey) sells and installs plumbing equipment, irrigation accessories and supplies in and near Eugene, Oregon (Tr 12). Ramsey's employees rejected the Plumbers Union as their bargaining representative in a Board election held in May, 1963 (Tr 14-17; Pet Exhs 1, 2). The incidents in question occurred shortly after that election.

#### **1. The Bank Job.**

In August, 1963 the United States National Bank of Oregon was constructing a branch office at Seventh and Chambers Streets in Eugene, Oregon (Tr 32; R 21). The general contractor was Gale Roberts Construction Company (Tr 33; R 21) (hereafter called Roberts), which had subcontracted the mechanical work exclusive of the sprinkler system to Stimson Company (R 30) (hereafter called Stimson). Stimson's plumbing employees were members of the Plumbers Union (R 11, 20). Ramsey had been directly engaged by the bank to install the sprinkler system (Tr 35). The branch opening had been arranged for a specific date, and any

delay in completing the project would cause serious financial loss to the bank (Tr 37).

On the morning of August 20 (Tr 43), shortly after Ramsey had commenced its work (R 30), the business manager for the Plumbers Union, Mr. Carmickle (Tr 20, 55), was told by Raymond Quick, a Stimson employee who was a member of the Plumbers Union, that Ramsey employees were working on the jobsite (Tr 50-51, 55). At about 1:30 p.m., Stimson's only employees on the job, Raymond Quick and Warner Dallas, reported sick and left work. The plumbers were "the key to the completion of [the] branch buildings" (Tr 32, 36).

Mr. Carmickle telephoned Mr. Pullen, the bank's assistant cashier and loan officer at its main Eugene branch (Tr 42), and told him

"\* \* \* \* that the Union was a customer of our branch, and \* \* \* that the Union was pulling the men off the job—or had pulled the men off the job at the 7th and Chambers Branch because of the employment of a non-union firm, which he identified as Ramsey-Waite." (Tr 43)

Mr. Pullen immediately called Mr. Kidd, manager of the bank's building and planning department (Tr 31), who arrived at the jobsite early the next morning (Tr 34).

In the morning, Mr. Carmickle again called Mr. Pullen and told him "that the Union men were awaiting word to go back to work. \* \* \* that the non-union personnel were not off the job yet, and therefore the Union men were not going back to work" (Tr 44-45). After discussing the problem, Mr. Kidd advised Mr. Ramsey that despite his personal sympathies, he "had to get [the] job completed \* \* \* in order to meet the deadline" (Tr 37). He asked Mr. Ramsey "to remove his people" from the job (Tr 37). This was done, and the sprinkler system was installed by Stimson's union plumbers, who returned to work within 30 minutes after Ramsey's people left (Tr 38, 39-40; R 30).

## **2. The City Hall Job.**

In January, 1964 the City of Eugene was constructing a new \$2,000,000 city hall. Roberts was the general contractor, and Ramsey had a subcontract for the sprinkler system (Tr 57-58, 63). Roberts' employees included carpenters, laborers and cement finishers (Tr 67, see also 69). The carpenters and laborers were represented by the Carpenters Union and Laborers Union respectively. The Plumbers Union and the Trades Council, through Mr. Carmickle and Mr. Horstrup, secretary of the Trades Council (R 20), had sought to enlist Roberts' aid in their dispute with Ramsey, but Mr. Roberts told them that his contract with Ramsey could not



be cancelled.<sup>7</sup> They led Mr. Roberts to believe that there would be a strike if Ramsey were permitted to do the work (Tr 58-62, 128). Ramsey commenced work on about January 13 (Tr 62). The Trades Council met and at the request of the Plumbers Union sanctioned a picket against Ramsey-Waite at the jobsite (Tr 129-130).

On January 14, the picket appeared (Tr 65-66), bearing a sign stating that the Union's dispute was with Ramsey alone (R 32). Respondents advised their members to decide for themselves whether to pass the picket. After initial uncertainty, they all returned to work; no employee or worker declined to cross the picket line (R 32; Tr 65-66, 71-76, 88-90, 103-104, 112-113, 118). Picketing ceased about noon the next day (R 32; Tr 91).

On January 16, the employees continued to work (Tr 138-139). However, a meeting was called at the Labor Temple for 4:30 p.m. that day (Tr 113). The carpenters, laborers and the cement finishers attended (Tr 113). Mr. Randall called the carpenters to the meeting (Tr 118-119), and members of the Laborers Union attended with Mr. Benson, their business agent (Tr 82-83, 91-92; R 20). Mr. Randall, Mr. Barton, Mr. Softly (financial secretary of the Carpenters Union; Tr 119), and Mr. Willis (secretary of the Oregon State Building

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7. Mr. Randall, the Carpenters' business representative and President of the Trades Council (R 20), also participated in these discussions (Tr 128-129).

Trades Council) were all present (Tr 77-78, 82-83, 91-92; R 20).

Mr. Randall stated that "the meeting was called specifically to tell the carpenters not to cross the picket line" (Tr 79; see also 82). He discussed the Union's constitution, including the provision prohibiting members from crossing a picket line. There would be a picket the next day, and "we could be fined up to a day's wages for going across the picket line" (Tr 105-106, 109). "\* \* \* [I]t was quite a lengthy statement he made, but part of the statement was to shut the job down." (Tr 108).

Mr. Brown, a member of the Laborers Union (Tr 81), testified that Mr. Randall stated that "a fine could be imposed" for crossing the picket line and that "everybody's name on that job was on a list" (Tr 79-80).

Mr. Magee, a member of the Carpenters Union (Tr 87), testified that Randall stated

"\* \* \* that he had the names of all the carpenters on the job \* \* \* He said that he was going to keep them in case he had to refer charges against the men. \* \* \* [H]e read the Bylaws of the Carpenters Union to the carpenters about the fines and the penalties of crossing the picket line." (Tr 93-94)

Mr. Maycumber, the carpenters' foreman, testified:

"It was brought up about him having a list of

the carpenters' names, and that he had hoped that he wouldn't have to do anything with the list, that we would recognize the picket the next morning, and just if we didn't cross the picket line, well, the list would be forgot about." (Tr 119)

Mr. Willis told the meeting

"\* \* \* 'I think Mr. Randall was pretty nice to you fellows for not turning you in.' And if we went through that picket in the morning if there was a picket on the job, he said he will be right to Mr. Randall to turn those names into the International \* \* \*'" (Tr 114)

Mr. Clement, another Carpenters Union member (Tr 102), testified:

"He just had a list of all the names of everybody on the job; and if we honored the picket the next day, he would like to throw the list away. And if we didn't honor it, he would see to it that we were punished accordingly or fines, discharged from the Union, and what not; whatever they had to do." (Tr 106)

"Q Now, what did he say in respect to punishment, if anything? Mr. Randall I am talking about.

A He just made the statement about there would be a fine of \$25 a day—I mean wages per day the day we went across the picket line.

\* \* \* \* \*

A He said that he would see to it that we were fined, we would get the limit or something, but I don't know just how that went." (Tr 109)

Mr. Willis also stated that

"\* \* \* if he were us, that he would—would stay away from the job and that he just wouldn't cross the picket line." (Tr 80)

"\* \* \* that the only way we were to get this thing settled was to stay away from the picket line, not to cross it." (Tr 94)

"He thought he should shut the job down and bring somebody to their knees. \* \* \*" (Tr 107, see 108)<sup>8</sup>

Picketing was resumed at 8:00 a.m. on January 17 in the presence of Mr. Randall and Mr. Horstrup (Tr 107). Roberts' laborers, carpenters and cement finishers refused to cross the picket line (Tr 67-68, 80-81). However, Ramsey's employees continued to work. The work stoppage continued for two weeks, at a daily loss to Roberts of \$200, and Roberts' employees returned to work only after Ramsey's men had finished the job (Tr 67-68, 81).

8. The foregoing facts are from the testimony of Mr. Roberts, Mr. Brown, Mr. Magee, Mr. Clement, Mr. Stevenson, and Mr. Maycumber. Respondents' witnesses, Mr. Randall and Mr. Barton, were understandably less specific, but their testimony contains significant concessions (see Tr 133-134, 147-148).

Mr. Brown, a member of the Laborers Union (Tr 81), testified that he refused to cross the line "based upon what was said at that meeting" (Tr 84). Mr. Maycumber, the carpenters' foreman, testified that his decision to refuse to work was based on what was said at the meeting and particularly the threat of fines of a "day's pay for each time they crossed the picket line" (Tr 122).

### **3. The Evidence Supported the Board's Findings.**

a. Respondents did not except to the trial examiner's findings with respect to the bank job except to the obvious conclusions that the Plumbers Union induced and encouraged Raymond Quick to leave his job for Stimson (R 31) and threatened and coerced the bank directly to put Ramsey off the job (R 31).<sup>9</sup> Raymond Quick's testimony that he suddenly developed conscientious scruples against working with Ramsey employees was unbelievable at best and was contradicted by Carmickle's own statements to Mr. Pullen that he had "pulled" Stimson's employees off the job and that they would not return until Ramsey's men had left.

There was abundant evidence to support the finding that the Plumbers Union induced Stimson's employees

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9. The testimony (credited by the trial examiner and not excepted to by Respondents (R 30)) that Mr. Carmickle told Mr. Pullen he had "pulled" Stimson's union plumbers from the job also showed that the Plumbers Union caused the walkout of Stimson's employees.

to leave their work (i.e., “pulled them off the job”) and coerced the bank directly by telling Mr. Pullen that it had done so and that Ramsey must be removed before they would return to work (R 31). This conduct caused Ramsey to be thrown off the job by the bank and violated §§ 8(b)(4)(i) and (ii)(B).

*Hod Carriers Union (Gilmore Construction Co.)*  
(1960) 127 NLRB 541, 46 LRRM 1043, enf’d  
(CA 8 1960) 285 F2d 397, cert den (1961) 366  
US 903

*Plumbers & Pipefitters Union (Bomat Plumbing & Heating)* (1961) 131 NLRB 1243, 48 LRRM 1245, enf’d (CA 2 1962) 299 F2d 497

*Operating Engineers Union (Layne-Western Co.)*  
(1961) 133 NLRB 208, 48 LRRM 1627, enf’d  
(CA 8 1963) 317 F2d 638

*Plumbers & Pipefitters Union (Arthur Venneri Co.)*  
(1962) 137 NLRB 828, 50 LRRM 1266, enf’d  
(CA DC 1963) 321 F2d 366, cert den (1963) 375  
US 921

**b.** Respondents’ pretense of establishing a primary picket line at the city hall jobsite under *Sailor’s Union of the Pacific (Moore Dry Dock Co.)* (1950) 92 NLRB 547, 27 LRRM 1108 was disproved by evidence of events which occurred away from the picket line. Respondents’ threats to fine and penalize union members who continued to work for Roberts through the picket line vio-



lated the statute, whether or not the picketing was otherwise lawful.<sup>10</sup>

The evidence established that neutral employees refused to work—not by reason of their own individual choice—but as a result of respondents' threats of reprisals. When they were advised on January 14 that the decision to work across the picket line was a matter of individual choice, they all worked, and they continued to work behind the picket line the following day. Respondents then called the neutral employees to a meeting, where they were told that their names were on a list which would be forgotten "in view of the confusion" if they would respect the picket line thereafter, but that they would be subject to fines and disciplinary action if they continued to work. As a result, they refused to cross the picket line the following day and testified that they did so because of what was said at the meeting. A more flagrant example of unlawful secondary activity could scarcely be stated. The primary picket had merely been changed into a signal picket for neutral employees, one intended to shut down the project and coerce the prime contractor to cease doing business with Ramsey. This conduct was a gross violation of the Act.

10. *Teamsters, AFL (Crump, Inc.)* (1955) 112 NLRB 311, 36 LRRM 1012  
*Hod Carriers Union (Gilmore Construction Co.)*, *supra*, (1960) 127 NLRB 541, 46 LRRM 1043, *enf'd* (CA 8 1960) 285 F2d 397, *cert den* (1961) 366 US 903  
*Bricklayers Union (J. Hilbert Sapp, Inc.)* (1958) 119 NLRB 1174, 41 LRRM 1335

*Teamsters Union (Riss & Co., Inc.)* (1961) 130 NLRB 943, 47 LRRM 1403, enf'd (CA 3 1962) 300 F2d 317

*Hod Carriers Union (Gilmore Construction Co.)*, supra, (1960) 127 NLRB 541, 46 LRRM 1043, enf'd (CA 8 1960) 285 F2d 397, cert den (1961) 366 US 903

Warnings to neutral employees to respect the primary picket line at a common jobsite is inducement and encouragement of unlawful secondary strike action,<sup>11</sup> particularly where it is accompanied by threats of union disciplinary action.

*Carpenters Union (Midwest Homes, Inc.)* (1959) 123 NLRB 1806, 44 LRRM 1233, enf'd (CA 7 1960) 276 F2d 694

*Carpenters Union (Associated General Contractors)* (1958) 120 NLRB 1658, 42 LRRM 1234

#### **4. Respondents are Jointly Responsible for the Unlawful Secondary Activities.**

Respondents, as participants in a joint venture and

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11. *International B. of E. W. v. National L. R. Bd.*, (1951) 341 US 694 at 701-702:

“\* \* \* The words ‘induce and encourage’ are broad enough to include in them every form of influence and persuasion. \* \* \*”

by reason of their concerted action, are all responsible for the unfair labor practices.

*Retail Clerks' Union (Retail Fruit Dealers' Assn.)*  
(1956) 116 NLRB 856 at 862, 38 LRRM 1323 at  
1325-1326, enf'd (CA 9 1957) 249 F2d 591

### **5. The Order was Proper and Should Be Enforced as Written.**

The order, which extends beyond the neutral employers referred to in the evidence, is necessary and is in a form repeatedly enforced by the courts to remedy unlawful secondary activities. The aggravated circumstances of this case justify broad relief. Particularly is this true in view of respondents' insistence that they would not permit Ramsey to work, even if it hired union help, "because that would be giving Ramsey-Waite privileges that the other plumbing contractors didn't have" (Tr 61). Thus, these were not isolated instances of such action, but are examples of the uniform policy of respondents.

*N.L.R.B. v. International Union of Operating Engineers, L. 571*, (CA 8 1963) 317 F2d 638 at 643-644

*N.L.R.B. v. International Hod Carriers, etc.*, (CA 8 1960) 285 F2d 397 at 403-404

*Local No. 5, United Ass'n of Journeymen, etc. v. N.L.R.B.*, (CA DC 1963) 321 F2d 366 at 371-372

**CONCLUSION**

The record established that respondents engaged in flagrant and aggravated secondary activities in an effort to bring the charging party, whose employees had rejected the Plumbers Union, "to their knees". They did so by inducements to neutral employees and coercion against neutral employers designed and intended to require project owners and contractors to cease doing business with the charging party.

The Board's order should be enforced.

Respectfully submitted,

McCOLLOCH, DEZENDORF & SPEARS  
JAMES H. CLARKE  
LEWIS K. SCOTT

*Attorneys for Ramsey-Waite Co., Inc.  
Amicus Curiae*

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Attorney

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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GARY CARSON LEWIS, ET AL., APPELLANTS

v.

GENERAL SERVICES ADMINISTRATION OF THE  
UNITED STATES, ET AL., APPELLEES

---

APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE SOUTHERN DISTRICT OF  
CALIFORNIA, SOUTHERN DIVISION

---

BRIEF FOR THE APPELLEES

---

EDWIN L. WEISL, JR.,  
Assistant Attorney General.

MANUEL L. REAL,  
United States Attorney,  
Los Angeles, California, 90012.

RICHARD J. DAUBER,  
Assistant United States Attorney,  
Los Angeles, California, 90012.

ROGER P. MARQUIS,  
ELIZABETH DUDLEY,  
Attorneys, Department of Justice,  
Washington, D. C., 20530.

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FOR THE NINTH CIRCUIT

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No. 20284

GARY CARSON LEWIS, ET AL., APPELLANTS

v.

GENERAL SERVICES ADMINISTRATION OF THE  
UNITED STATES, ET AL., APPELLEES

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APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE SOUTHERN DISTRICT OF  
CALIFORNIA, SOUTHERN DIVISION

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BRIEF FOR THE APPELLEES

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OPINION BELOW

The memorandum of decision of the district court appears in the record at pages 61-63.

JURISDICTION

Appellants sought to invoke the jurisdiction of the district court under the Act of February 6, 1901, sec. 1, 31 Stat. 760, as amended, 36 Stat. 1167, 25 U.S.C. sec. 345, providing for actions for allotments. It is the position of appellees that the district court lacked jurisdiction. On April 19,

1965, the district court dismissed the action for declaratory relief and for injunction on the ground that the land involved was acquired land and not subject to laws relating to the public domain (R. 61-63, 70-71). Notice of appeal was filed June 17, 1965 (R. 73). The jurisdiction of this Court rests upon 28 U.S.C. sec. 1291.

### QUESTIONS PRESENTED

1. Whether lands which have been acquired by the United States by condemnation for a naval reservation and have been declared surplus by the General Services Administration are subject to Indian allotment under the General Allotment Act of February 8, 1887.

2. Whether the district court was correct in dismissing an action to enjoin officers of the General Services Administration from disposing of lands which have been declared surplus, when the United States had not consented to be sued.

### STATUTE INVOLVED

The pertinent portion of the Act of February 28, 1958, sec. 5, 72 Stat. 27, 40 U.S.C. sec. 472(d), reads as follows:

Sec. 5. The Federal Property and Administrative Services Act of 1949 (63 Stat. 377), as amended, is hereby further amended by revising section 3(d) to read as follows:

"(d) The term 'property' means any interest in property except (1) the public domain; lands reserved or dedicated for national forest or national park purposes; minerals in lands or portions of lands withdrawn or reserved from the public domain which the Secretary of the Interior determines are suitable for disposition under the public land mining and mineral leasing laws; and lands withdrawn or reserved from the public domain except lands or portions of lands so withdrawn or reserved which the Secretary of the Interior, with the concurrence of the Administrator, determines are not suitable for return to the public domain for disposition under the general public land laws because such lands are substantially changed in character by improvements or otherwise; (2) naval vessels of the following categories: Battleships, cruisers, aircraft carriers, destroyers, and submarines; and (3) records of the Federal Government."

#### STATEMENT

On February 26, 1965, appellants filed this action, entitled a complaint for declaratory relief and for injunction relating to Indian allotment (R. 2-10). The allegations of the complaint may be summarized as follows: Plaintiffs are Indians entitled to allotment under the General Allotment Act, Section 4,



Act of February 8, 1887, as amended, 25 U.S.C. sec. 334, and their claims to allotment to selected parcels of land which they had previously filed in the Bureau of Land Management, Riverside, California, had been threatened by actions of the defendants. The lands in question had been used as a portion of Camp George Elliott, United States Naval Reservation, and had been declared to be excess to the needs of the United States. The Secretary of the Interior had not determined that the lands were not suitable for return to the public domain, and was without authority to do so. The property is not surplus within the meaning of 40 U.S.C. sec. 471(c), and the General Services Administration is without authority to act as a holding agency of the property, to offer it for sale, to accept bids from the public relating to the sale of the property, to open bids and award the property to bidders, and in any other way to deal with the property. Defendants threatened to sell the property to the highest private bidder, on March 3, 1965, and thus deprive plaintiffs of their right to acquire the allotments applied for. Defendants' intention to sell the property would prevent plaintiffs from exhausting their

administrative or judicial remedies, but defendants had refused to delay the sales until a final administrative and judicial decision on the applications for allotments. The prayer was for the following relief:

(1) The issuance of a temporary restraining order immediately enjoining defendants from further advertising the property for sale, from opening the sealed bids as scheduled, and enjoining and restraining defendants from selling the lands to any bidder. (2) That the court, for its final judgment, permanently restrain and enjoin the defendants from proceeding with the sale of the land unless and until plaintiffs have had a final determination in the Department of the Interior and in the courts as to their rights to allotments on the lands in question. (3) That the court, after an appropriate hearing, issue its preliminary injunction for the same purpose as the aforesaid temporary restraining order. (4) That defendants prepare and deliver to plaintiffs a list of the names and addresses of all prospective bidders of the land. (5) For such other and further relief as to the court may seem just and proper. Named as defendants are: The General Services Administration of the United

States of America, and six of its agents and employees; the United States of America; John Does 1 through 2,000, inclusive, who are alleged to have made bids to purchase the subject lands and Richard Roes 1 through 50, who are alleged to be agents, officers, servants, or employees of the General Services Administration of the United States of America.

On March 2, 1965, the court entered an order that the defendants show cause why they should not be restrained and enjoined from awarding any bids for the sale of the property in question (R. 26-27). On March 10, 1965, the defendants filed an opposition to the order to show cause, and a motion to dismiss on the following grounds: (1) This is a suit against the United States, to which it has not consented. (2) The jurisdiction over the lands involved has never been granted to the Department of the Interior, and the lands are not subject to allotment under 25 U.S.C. sec. 334. (3) The court has no jurisdiction over the control, administration, or disposal of federal "purchased" property. (4) The complaint does not state a cause of action upon which relief can be granted. (R. 40-41).

laintiffs filed an opposition to the motion based on the complaint, brief in support of petition for temporary injunction, and oral argument to be presented to the court (R. 52).

On April 1, 1965, the court filed a memorandum of decision, stating that the case hinges on the provisions of 40 U.S.C. sec. 472(d), which defines property which is subject to disposal of surplus property under 40 U.S.C. sec. 471(c). The court stated that there is a distinction between public land and acquired land, and concluded that Section 472(d) pertains only to lands withdrawn or reserved from the public domain and not lands reacquired by the Government. The court held that the defendants had shown cause why an injunction should not issue, and that "the action should be and is hereby dismissed." (R. 61-63). On April 19, 1965, a judgment of dismissal was entered (R. 60-71). This appeal followed (R. 73-74).

#### SUMMARY OF ARGUMENT

A. The General Allotment Act of 1887 does not apply to "acquired lands" of the United States, but only to "public land" or the "public domain." Entries under the general land



laws may be made only where the United States had indicated that its lands are held for disposal under those laws. Rawson v. United States, 225 F.2d 855 (C.A. 9, 1955), cert. den., 350 U.S. 934; Thompson v. United States, 308 F.2d 628 (C.A. 9, 1962); Oklahoma v. Texas, 258 U.S. 574 (1922). In defining "property" which may be disposed of as surplus property of the United States, 40 U.S.C. sec. 472(d) excludes the public domain lands. All other property, including property acquired by purchase or condemnation for a specific governmental use, is property within the definition. The property here involved is acquired property and has been declared excess by the Department of the Navy. It has been termed surplus property by the Administrator, General Services Administration, and he has the authority to dispose of it under 40 U.S.C. sec. 484.

B. This is an unconsented suit against the United States. The land involved is owned by the United States, and the injunctive relief sought would expend itself against the land. Thus, the United States is an indispensable party to the litigation. White v. Administrator of General Services Admin.

of U.S., 343 F.2d 444 (C.A. 9, 1965). The only jurisdictional allegation of the complaint is 25 U.S.C. sec. 345, which grants jurisdiction to the district court in an action respecting allotments of Indian lands, and consent is given to sue the United States. This is not a suit for an allotment. It is a suit for injunction and the allotment statute does not include suits for injunction against the United States, nor authorize court control of transfers of jurisdiction between the General Services Administration and the Department of the Interior.

#### ARGUMENT

##### THE DISTRICT COURT CORRECTLY DISMISSED THIS ACTION

We believe there are two clear grounds which compel affirmance of the judgment. Although, logically, the question of sovereign immunity from this suit is jurisdictional, we discuss first the ground taken by the district court, which demonstrates that appellants plainly have no case on the merits of their claim.

A. The General Allotment Act of 1887 does not apply to "acquired lands" of the United States. - Appellants contend



that the lands in question are public lands, and that they are entitled to allotments under the Act of February 8, 1887, 24 Stat. 388, 25 U.S.C. sec. 334, which provides for allotments to Indians "upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, \* \* \*." Appellants here have the same difficulty as did the appellant in Thompson v. United States, 308 F.2d 628 (1962), where this Court stated (p. 631): "Appellant's difficulty is that he fails to recognize the distinction between 'public land' and 'acquired land.'" "Public domain" or "public lands" were authoritatively defined in Newhall v. Sanger, 92 U.S. 761, 763 (1875), where the Supreme Court declared that "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." That has been quoted and reaffirmed in numerous cases. Union Pacific R.R. Co. v. Harris, 215 U.S. 386, 388 (1910); Minnesota v. Hitchcock, 185 U.S. 373, 391 (1902); Barker v. Harvey, 181 U.S. 481, 490 (1901); Mann v. Tacoma Land Company, 153 U.S. 273, 284 (1894); Bardon v. Northern Pacific Railroad, 145 U.S. 535, 538 (1892). "Public domain" has the same meaning. Barker v. Harvey, supra.

The question of general land laws applying to "acquired lands" has been before this Court in the last several years in two cases: Thompson v. United States, supra; and Rawson v. United States, 225 F.2d 855 (1955), cert. den., 350 U.S. 934. In both cases the Court held that the mining laws had no relation to "acquired lands," but only to lands forming part of the "public domain." In pointing out the distinction between "public land" and "acquired land," the Court stated in the Thompson case (pp. 631-632):

Each was defined with commendable clarity in Barash v. Seaton, 1958, 103 U.S.App.D.C. 159, 256 F.2d 714, 715, as follows: "Acquired land is Government owned land acquired from private ownership. Public land is Government owned land which was part of the original public domain." These definitions are quoted with approval in Murray v. United States, 8 Cir., 1961, 291 F.2d 161. Since the lands in question were not public lands within the meaning of the phrase as used in the National Forest Act, and since the lands in question were acquired by the United States for a specific purpose, our decision is controlled by the opinion of the United States Supreme Court in Oklahoma v. Texas, 1922, 258 U.S. 574, 599, 600, 42 S.Ct. 406, 66 L.Ed. 771, and the opinion of this circuit in Rawson v. United States, 9 Cir., 1955, 225 F.2d 855, cert. den. 350 U.S. 934, 76 S.Ct. 306,

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100 L.Ed. 816. \* \* \* In Rawson, this court held that there was no authority for a mineral location on lands which had been acquired by the United States for use in connection with an emergency relief project and in so holding, held that Title 30 U.S.C.A. §22 must be read in the light of the entire enactment of which it was but a part, and that when so read, the section embraces land owned by the United States, but not all lands so owned. [Emphasis by Court] It is there held that it was only where the United States had indicated that the lands are held for disposal under the general land laws that a mineral location might be filed. [Emphasis added].

The district court correctly followed this Court's decisions in the Rawson and Thompson cases, supra, and also Oklahoma v. Texas, 258 U.S. 574 (1922), cited by this Court in the above quotation (R. 62-63). Appellants attempt to distinguish those cases on the ground that the lands involved were still held for the purposes for which they were acquired, and the subject lands were "surplus, unappropriated, and unreserved at the time of selection by plaintiffs" (Br. 12-13). This results from appellants' misunderstanding of the law as shown by their statement that at such time as federally owned land becomes unappropriated, "it is by definition returned to the public domain" (Br. 11). This is contrary to this Court's ruling in the Rawson case, where it stated (225 F.2d 858):

\* \* \* The Stoller tract, purchased by the government for prescribed uses, does not fall within the category of public land. It may be stated as a universal proposition that patented lands reacquired by the United States are not by mere force of the reacquisition restored to the public domain. Absent legislation or authoritative directions to the contrary, they remain in the class of lands acquired for special uses, \* \* \*.

Traditionally, the public lands of the United States have been administered by the Department of the Interior, whereas here, as already noted, the acquired land involved had been authoritatively transferred to the Department of Agriculture for administration by that agency. The placing of these lands under the jurisdiction of the latter Department in itself refutes any notion that such lands were subject to the general land or mining laws.

To hold otherwise would create an irrational distinction between those acquired lands the title to which had once been part of the public domain, and those lands, of which there are of course a very substantial quantity, that had never been part of the public domain, and hence could not be "returned to the public domain."1/

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/ Whether the subject land in California was originally public domain, or was part of a Spanish or other recognized grant, does not appear.



The lands here involved have been placed under the jurisdiction of the General Services Administration, 40 U.S.C. sec. 484, and the Department of the Interior has never had any control or jurisdiction over them. How, then, could that Department issue allotments to appellants?

In its memorandum of decision (R. 61-63), the court stated that this "case hinges on the provisions of section 472 of Title 40, U.S. Code." This section is quoted supra, p. 3. The court also quoted from the Senate and House Committee reports which accompanied the bill, which appear in U.S. Code Congressional and Administrative News, 85th Cong., 2d sess. (1958) Vol. 2, pp. 2227-2256. A section-by-section analysis of the bill is given. At page 2239, in regard to Section 1, the following statement was made:

The committee, in employing the term "public lands," intends it to apply in its technical or legal sense, as distinguished from "reserved public lands" or "withdrawn public lands," and "acquired public lands."

At pages 2243 -2244, in discussing Section 5 of the bill (40 U.S.C. sec. 472(d)), the following statement was made:

Section 5 would amend in two particulars the Federal Property and Administrative Services Act of 1949 (63 Stat. 377), as amended.

First, it would except from the real property-disposition provisions of the 1949 act, minerals in withdrawn or reserved public domain lands which the Secretary of the Interior determines are suitable for disposition under the public land mining and mineral leasing laws.

Second, it amends the 1949 act to provide that only those withdrawn or reserved public domain lands surplus to the needs of Federal agencies found by the Secretary of the Interior --with the concurrence of the Administrator of General Services--not suitable for restoration to public land status by virtue of their having been substantially changed in character by improvements, or otherwise, would hereafter be subject to the real property disposition provisions of the amended 1949 act.

Both of these amendments would clarify the operation of existing law; one would make it clear that only when determined by the Secretary to be not suitable for mining or mineral leasing purposes would the mineral estate pass with the title to the surface estate being disposed of under surplus property provisions; the other would reverse the roles of the Secretary and the Administrator so as to provide that the Secretary would make an initial judgment of the nature with which his Department is most familiar--suitability of lands for public land uses, a traditional Interior function and if the Administrator concurs in a finding of nonsuitability, the lands would be disposed of as surplus.



This statement was also quoted by the district court, and followed by the holding that "There is a distinction between public land and acquired land," citing the Rawson case, and quoting from it at page 858, as follows:

\* \* \* It may be stated as a universal proposition that patented lands reacquired by the United States are not by mere force of the reacquisition restored to the public domain.

The court concluded that Section 472(d) pertains only to lands withdrawn or reserved from the public domain and not lands reacquired by the Government. Moreover, the section itself vests in the Secretary of the Interior, with the concurrence of the General Services Administrator, the authority to determine whether lands are suitable for return to the public domain for disposition under the public land laws. Appellants are simply asking the courts to exercise this authority instead of allowing Congress to exercise its plenary power to dispose of the property of the United States.

There is nothing in appellants' quotation from the reports on the subject bill from U.S. Code Congressional and Administrative News (Br. 9-11) which would indicate that the property

re involved was subject to entry under the General Allotment Act, 25 U.S.C. sec. 334. It is clear that the definition of property in Section 472(d) excludes the public domain lands and lands withdrawn from the public domain over which the Bureau of Land Management, Department of the Interior, has jurisdiction and which are subject to the general land laws. All other property, including property acquired by purchase or condemnation for a specific governmental use, and the subject property was acquired, is property within the definition of 40 U.S.C. sec. 472(d). Since the property described in the complaint has been declared excess by the Department of the Navy, and has been deemed surplus property by the Administrator, General Services Administration, the Administrator has the authority to dispose of the property under 40 U.S. sec. 484.

B. This is an unconsented suit against the United States.

The land involved is owned by the United States, and the injunctive relief sought would expend itself against that land. Thus, the United States is an indispensable party to this litigation, unless the matter falls within the only two recognized exceptions which permit suit against government officers respecting property as to which

they assert an interest of the United States. The two exceptions are (1) that the officers were acting beyond their statutory duty or (2) that their actions were constitutionally void.

Appellants do not allege or urge either exception. Even accepting their allegations as establishing a wrong, that "does not establish that the officer, in committing that wrong, is not exercising the powers delegated to him by the sovereign." Dugan v. Rank, 372 U.S. 609, 620-622 (1963); Malone v. Bowdoin, 369 U.S. 643 (1962); Mine Safety Co. v. Forrestal, 326 U.S. 321 (1945); Goldberg v. Daniels, 231 U.S. 218 (1913). "We hold that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law, if they would be regarded as the actions of a private principal under normal rules of agency." Larson v. Domestic & Foreign Corp, 337 U.S. 682, 695 (1949); Switzerland Company v. Udall, 337 F.2d 57 (C.A. 4, 1964).

In White v. Administrator of General Services Admin. of U.S., 343 F.2d 444 (1965), this Court held that a suit for mandamus ordering conveyance of land on behalf of the United States by its agent is a suit against the United States and it

ould have to be a party to the suit. The Court stated (p. 445):  
Except as agents of the United States the appellees would have  
ad no authority to make a contract to convey land belonging to  
the United States, or to make the deed which they did make,  
whether that deed was in compliance with the terms of the con-  
tract or not."

The only jurisdictional allegation contained in the  
complaint is 25 U.S.C. sec. 345 (R. 5), and this appears to be  
the basis for naming the United States as a defendant. That  
section grants jurisdiction to the district court in an action  
respecting allotments of Indian lands, and consent is given to  
sue the United States. The present suit is not for an allotment.  
It is for an injunction against officers of the General Services  
Administration, who are agents of the United States. The waiver  
of sovereign immunity under 25 U.S.C. sec. 345 is narrow and  
specifically limited. It does not include suits for injunction  
against the United States. "To interfere with its management  
and disposition of the lands or the funds by enjoining its of-  
ficials, would interfere with the performance of governmental



functions and vitally affect interests of the United States. It is, therefore, an indispensable party to this suit. It was not joined as defendant. Nor could it have been, as Congress has not consented that it be sued." Morrison v. Work, 266 U.S. 481, 485-486 (1925). The Morrison case demonstrates that the mere attempt to assert negative interference with land disposal does not avoid the objection of sovereign immunity.

Before the court could make any adjudication regarding allotment, it would have to order that the property be transferred to the public domain. This would require affirmative relief against the United States. It is well settled that affirmative relief against the United States cannot be granted by the courts. Larson v. Domestic & Foreign Corp., supra.

There is no allegation in the complaint that the Administrator has abused his discretion, nor that he does not have the authority to dispose of the subject property. On the contrary, the complaint alleges that the General Services Administration has "refused to transfer jurisdiction of said lands to the Department of the Interior." (R. 6). No authority is cited for the

proposition that the court has jurisdiction to require such a transfer, and we submit that where Congress has specifically provided by law that the Administrator, in his discretion, may dispose of surplus property, such disposal is not a subject over which the "judicial power" of the United States is extended, but is a field in which the authority of the Congress is supreme. Standard Oil Co. of California v. United States, 107 F.2d 402, 409 (C.A. 9, 1940), cert. den., 309 U.S. 654, 673. Nor could this case be tortured into one under the mandamus statute, 28 U.S.C. sec. 1361, to compel the defendants to perform a ministerial duty, since the statute clearly grants the Secretary of the Interior and the Administrator of General Services discretion to make the appropriate determination.



## CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the district court should be affirmed. <sup>2/</sup>

Respectfully,

EDWIN L. WEISL, JR.,  
Assistant Attorney General.

MANUEL L. REAL,  
United States Attorney,  
Los Angeles, California, 90012

RICHARD J. DAUBER,  
Assistant United States Attorney  
Los Angeles, California, 90012

ROGER P. MARQUIS,  
ELIZABETH DUDLEY,  
Attorneys, Department of Justice  
Washington, D. C., 20530.

OCTOBER 1965

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2/ Since, for the reasons stated, we think the court clearly properly dismissed the complaint, we do not explore at length another defect in plaintiffs' case which arises from the fact that the statute, 25 U.S.C. sec. 334, applies "Where any Indian not residing upon a reservation \* \* \* shall make settlement \* \* \*." It does not appear that appellants have made settlement.

## CERTIFICATE OF EXAMINATION OF RULES

I certify that I have examined the provisions of Rules 18 and 19, C.A. 9, and that in my opinion the tendered brief conforms to all requirements.

---

ROGER P. MARQUIS  
Attorney, Department of Justice

**United States Court of Appeals**  
**FOR THE NINTH CIRCUIT**

No. 20284

GARY CARSON LEWIS, on behalf of  
SHELLY ANN LEWIS, et al.,

Plaintiffs and Appellants,

vs.

THE GENERAL SERVICES ADMINISTRATION  
OF THE UNITED STATES OF AMERICA,  
et al.,

Defendants and Appellees.

On Appeal From the United States District Court  
For the Southern District of California  
Southern Division

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APPELLANTS' OPENING BRIEF

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DONALD JAY SOLOMON  
3821 Fourth Avenue  
San Diego, California 92103

Attorney for Plaintiffs (Appellants)

FILED

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FRANK H. SCHMIDT, CLERK



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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 20284

GARY CARSON LEWIS, on behalf  
of SHELLY ANN LEWIS, et al.

Plaintiffs and Appellants,

vs.

THE GENERAL SERVICES ADMINISTRATION  
OF THE UNITED STATES OF AMERICA,  
et al. ,

Defendants and Appellees.

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APPELLANTS' OPENING BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the United States District Court for the Southern District of California. The District Court had jurisdiction of the cause by virtue of 25 U.S.C. 345.

The plaintiffs in the action are Indians entitled to allotment under the General Allotment Act, Section 4, Act of February 8, 1887, 25 U.S.C. 334, as amended. The complaint was filed to obtain a declaration of their rights to selection, entry, settlement, and allotment on and to certain unimproved real property on the former United States Naval Reservation known as Camp George F. Elliott, which property was described in the complaint. (R 12-25). Plaintiffs also sought an injunction prohibiting defendants from disposing of said real property pending

the administrative and judicial determination of plaintiffs' rights relating to said property (R 2, 9).

Dismissal of the complaint was entered April 19, 1965 (R 70). Plaintiffs filed their notice of appeal from said judgment on June 17, 1965. (R 73).

The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal by virtue of 25 U.S.C. 345 and 28 U.S.C. 1291.

### STATEMENT OF FACTS

The property involved in this litigation consists of unimproved portions of the former United States Naval Reservation known as Camp George F. Elliott. A portion of Camp Elliott, not involved in this litigation, is still activated. The major part of Camp Elliott was condemned by the United States for purposes of establishing a naval reservation in Civil Case Nos. 105 and 162, San Diego. The Navy held the property until on or about September 14, 1960, at which time they reported a large part of it to the General Services Administration as excess to the needs of the Department of the Navy. General Services Administration promptly followed their standard screening process for determining the existence of any federal need for the property by circulating the availability of the property by notice to Federal agencies. The result of the screening was a showing that the property was not needed or desired for any federal purpose, and the property was determined surplus September 22, 1961.

Plaintiffs filed for Indian allotment on unimproved portions of this land under the General Allotment Act of 1887, sec. 4, in the appropriate land office of the Bureau of Land Management. (R 5). Final decision on said filings has not been

rendered by the Secretary of the Interior.

Plaintiffs notified General Services Administration of the filings and requested that General Services Administration transfer the property to the Department of the Interior to facilitate processing of the applications.

Disregarding the fact that their exercise of jurisdiction over the unreserved portion of Camp Elliott had been brought in issue by applications for Indian allotment, General Services Administration offered a portion of the property to public sale with the bid opening scheduled for March 3, 1965. Plaintiffs filed suit in the District Court seeking an injunction preventing the disposal of the land on which they had filed, pending the administrative and judicial determination of plaintiffs' rights relating to said land. (R 2).

Defendants moved to dismiss the complaint. (R 40). Plaintiffs opposed defendants' motion to dismiss. (R 52). The District Court heard arguments on March 11, 1965, received briefs and took the matter under submission. (Reporter's Transcript of Proceedings Pgs. 1 - 5 Inclusive). Plaintiffs filed a Supplemental Brief on March 26, 1965 (R 53).

Judgment of the District Court was entered April 19, 1965, granting Defendants' motion to dismiss the complaint. (R 70). The judgment was based on the memorandum of decision of the Court concluding that 40 U.S.C. 472(d) does not pertain to lands reacquired by the government on the basis that there is a distinction between public land and acquired land. (R 61).

This appeal followed. (R 73).

SPECIFICATION OF ERRORS

1. The District Court erred in granting Defendants' motion to dismiss.
2. The District Court erred in dismissing Plaintiffs' complaint with prejudice.
3. The District Court erred in concluding that Title 40, U.S.C. 472(d) does not pertain to lands acquired or reacquired by the government.
4. The District Court erred in failing to restrain or enjoin the Defendants from selling the real property selected by Plaintiffs for allotment under 25 U.S.C. 334, as amended.
5. The District Court erred in failing to issue a declaratory judgment declaring that Plaintiffs are entitled to enter the land selected for allotment under 25 U.S.C. 334, as amended.
6. The judgment of the District Court was in violation of the Fifth Amendment to the United States Constitution by establishing an arbitrary classification of land without regard to the use or character of said land, thus depriving Plaintiffs of the right to select allotment on the land of their choice.

QUESTION PRESENTED

IS THE LAND WHICH PLAINTIFFS SELECTED AS THEIR CHOICE FOR INDIAN ALLOTMENT UNAVAILABLE TO THEM SIMPLY BECAUSE IT CAME INTO GOVERNMENT OWNERSHIP BY PURCHASE (CONDEMNATION)?

## SUMMARY OF ARGUMENT

This litigation involves the rights of Indians seeking allotment under Section 4 of the General Allotment Act of 1887 to have their applications for allotment to certain property processed by the Department of the Interior without interference by General Services Administration.

The land in question came into Federal ownership by the process of condemnation. It was held by the Department of the Navy as part of a Naval Reservation and later declared excess to the needs of the Navy, and surplus to the needs of the Government. This is land which came into the public domain by virtue of its acquisition and instantly was segregated, i. e. , reserved from the operation of the public domain laws by virtue of its being put to the special governmental use as a Naval Reservation. Upon declaration that the land was surplus to the needs of the Government, it became unimproved, unappropriated, federally-owned real property suitable for return to the public domain in an unreserved status.

By virtue of 40 U.S.C. 472(d) this land became available for allotment to Plaintiffs.

## ARGUMENT

THE MANNER IN WHICH UNIMPROVED REAL PROPERTY COMES INTO FEDERAL OWNERSHIP IS IRRELEVANT AFTER THE LAND BECOMES SURPLUS TO THE NEEDS OF THE GOVERNMENT AND IS THEREFORE UNAPPROPRIATED.

Plaintiffs seek only to obtain their Indian allotment on the land which they have selected. There is no question as to whether this unimproved, unappropriated



federally-owned property is physically suitable for selection by Plaintiffs. But Defendants would sell this land to the highest bidder and deprive Plaintiffs of their allotment.

The statute authorizing allotments to Plaintiffs is Section 4 of the General Allotment Act (Act of February 8, 1887, 24 Stat. 388, 389), which in pertinent part states:

"where any Indian not residing upon a reservation. . . shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children. . ."

Defendants would deny allotment on this land to Plaintiffs because it is what they call acquired land - land acquired or reacquired by the United States by purchase, condemnation, etc., and held for a specific public purpose. This property was acquired by condemnation. The property the United States obtained in the purchase of the Territory of Alaska, to which the general land laws relating to disposition of land applies, was purchased. Much property purchased to form or add to various Indian reservations was purchased, and portions of the General Allotment Act apply to that land. The latter is subject to allotment to Indians on those reservations by virtue of the Act of February 14, 1923 (42 Stat. 1246).

The availability of this land for allotment is a birthright which Defendants would deprive Plaintiffs of by misguided disuse of the provisions of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. 484 (63 Stat. 385)

and 40 U.S.C. 472(d) (72 Stat. 29). Defendants assert that Section 484 gives the General Services Administration, hereinafter referred to as "GSA," the right to dispose of all acquired land regardless of its nature and character at the time they would dispose of it. Plaintiffs believe that Section 472(d) excepts this property from the definition of the term property as used in said Act.

Section 472(d) is the result of successive amendments enacted in 1952 (66 Stat. 593) and 1958 (72 Stat. 29).

The pertinent wording before the 1952 amendment was:

"(d) the term 'property' means any interest in property of any kind except (1) the public domain and lands reserved or dedicated for national forest or national park purposes;"

The 1952 amendment inserted after "domain" the following:

"including lands withdrawn or reserved from the public domain which the Administrator, with the concurrence of the Secretary of the Interior, determines are suitable for return to the public domain for disposition under the general public land laws because such lands are not substantially changed in character by improvements."

Upon enactment of the 1958 amendment, at the time of Plaintiffs filing for allotment on the land and presently, said section read:

"The term 'property' means any interest in property except (1) the public domain; lands reserved or dedicated for national forest or national park purposes; minerals in lands or portions of lands withdrawn or reserved from the public

domain which the Secretary of the Interior determines are suitable for disposition under the public land mining and mineral leasing laws; and lands withdrawn or reserved from the public domain except lands or portions of lands so withdrawn or reserved which the Secretary of the Interior, with the concurrence of the Administrator, determines are not suitable for return to the public domain for disposition under the general public-land laws because such lands are substantially changed in character by improvements or otherwise;..."

There was no comment on the meaning of the change or of the section of the amending bill in the 1952 report to Congress (Vol. 2, 1952, U.S. Code Congressional and Administrative News, 2121). But, there was substantial comment on what Congress intended for the language to mean as Section 472(d) read after the 1958 amendment; by what was meant by the terms public domain, public lands, reserved, withdrawn, acquired, and reacquired from 1958 on (Vol. 2, 1958, U.S. Code Congressional and Administrative News, 2223, at pg. 2227).

The amended Section 472(d) had incorporated the 1952 and 1958 amendments. The class of property taken out of GSA's control was expanded in 1952 and again in 1958. The procedure to be followed to insure that these properties not be administered by GSA was changed in 1958.

Congress, in making needful rules and regulations respecting the Territory belonging to the United States, declared that the terms "public lands" and "public domain" are interchangeable; declared that those terms encompass acquired

lands reservations, i. e., reservations composed of acquired lands held for a specific public purpose, such as a military reservation, that these too are reservations from the public domain.

What did Congress say they meant by "lands withdrawn or reserved from the public domain"? What is "public domain"? What are "public lands"? What is "reserved or reservation"?

"Public lands" or "public domain lands" are purely and simply Federally-owned lands. This is the meaning used by Congress in the reported bill. Congress did not limit the meaning of "public domain lands" merely to "original public domain", though they had the opportunity to do so.

"In their general sense the terms "public lands" and "public domain lands" are defined as:

"Original public domain lands which have never left Federal ownership; also, lands in Federal ownership which were obtained by the Government in exchange for public lands or for timber on such lands; also, original public domain lands which have reverted to Federal ownership through operation of the public-land laws (source: Department of the Interior, Bureau of Land Management, Glossary of Public-Land Terms (1949)).

"In its technical, legal, or statutory sense, however, the term 'public lands' by itself---employed interchangeably with the term 'public domain lands'---is today used

to embrace vacant, unappropriated, unreserved Federal real property; i. e. , lands open to the public land laws relating to settlement, entry, location, and sale, and authorizing entry for mining, mineral leasing, timber and other materials removal, local public purposes, recreation, homesteading, etc. Such lands are administered by the Bureau of Land Management, Department of the Interior.

" 'Public lands' as a term by itself should also be distinguished from the term 'reserved public lands' or 'withdrawn public lands.' All are public lands, all are public domain; the former generally refers to unreserved public lands, while the latter two terms refer to areas described as 'Federal reservations.' :

"The term 'withdraw' is used interchangeably with the term 'reserve' to describe the statutory or administrative action which restricts or segregates a designated area of Federal real property from the full operation of the public-land laws relating to settlement, entry, location, and sales, which action holds them for a specific---and usually limited ---public purpose.

"Examples of reservations include: national forest reserve lands; national parks, monuments, and other units of the national park system; fish and wildlife refuges; petroleum, oil shale, coal, and other mineral reserves;



recreation and wilderness areas; reclamation and power withdrawals or reservations; military reservations, and similar areas, all of which are held by some Federal agency for specified public purposes, and all of which may be created wholly from reserved original public-domain lands, wholly from acquired or reacquired lands, or from portions of both. Other examples of Federal reservations, frequently created wholly from acquired lands, are post-office sites, weather stations, immigration and customs facilities, lighthouses, Federal Court-house sites, and the like.

"Federally owned lands, as distinguished from reserved public lands on Federal reservations, then, are commonly referred to today---as they are in the reported bill and this report---as 'public lands' or 'public domain lands.'"

The above quotations are found at pages 262, 263, 265 and 266 of the Report from the Committee on Interior and Insular Affairs of H.R. to accompany H.R. 5538; 85th Congress, 1st Session, H.R. #215, March 21, 1957.

All federally owned land is public land which is either appropriated or unappropriated. Once it becomes appropriated to a governmental use it is withdrawn or reserved from the public domain. At such time as it becomes unappropriated, as did the land in question when it was declared surplus by GSA in 1961, it is by definition returned to the public domain. It becomes unappropriated public land. It becomes federally owned land not otherwise appropriated. Such was the



status of the parcels of land selected by Plaintiffs at the time they filed their appropriate papers in the Riverside District Land Office of the Bureau of Land Management.

The basic assumption of Defendants' position is that when the United States acquires land by purchase or condemnation, said land never has any relation to the public land laws. Such a position ignores the words of the Report to Congress referred to above. The fact that the land is acquired for a special governmental purpose and is therefore instantly reserved from the public domain confuses the Defendants. Simply stated, the condemnation of this land by the United States operated both to acquire the land in the name of the United States and, because the land was acquired for a special governmental purpose, to reserve the land from the operation of the public land laws relating to settlement or entry.

Defendants feel that since some acquired lands are unavailable for settlement under the General Allotment Act (while reserved to a special governmental use) no acquired lands are available.

OKLAHOMA vs. TEXAS, 258 U.S. 574 (1922) stands for the principle that acquired or reacquired lands do not come under the operation of the public land laws by the mere force of the reacquisition. But, this is not relevant where we are concerned with acquired land after it is no longer held for a special governmental purpose. The reasoning of the cases is that the operation of the public land laws while the property was reserved would interfere with the purpose and administration of the land while reserved. The essential difference is that this land was surplus, unappropriated, and unreserved at the time of selection by Plaintiffs.

SAM D. RAWSON vs. U.S., 225 F 2d 855 (1955) involved an application

on land held for a reclamation project at the time of the filing. The land was not subject to entry because it was being held for the governmental purpose for which the lands were acquired.

In light of the 1958 amendment it would be inconsistent to carry the ruling of those cases to the situation where an application has been made for Indian allotment on land after it has been shown to be outside of the needs of any federal agency, as was done in the instant case.

The same principle is expressed in THOMPSON vs. U.S., 309 F 2d 628 (1962). That case involved an application filed in 1954 under the leasing laws. The application was on land acquired and held under a specific governmental purpose. The court said that the recognition of a mining location pursuant to 30 U.S.C. 22 would be wholly inconsistent with the purpose of the acquisition of the land. The land was held for the purpose of preserving the timber on the land at the time of filing the mining claim.

The El Mirador Hotel case, 60 L.D. 299 (1949) involved a Gerard Scrip application filed in 1947. The decision was that acquired land is not immediately open for entry, etc., upon acquisition by the United States for a specific governmental purpose. The term "public lands" generally does not include lands acquired by the United States for private ownership. This case does not apply where, at the time of application, the lands are no longer "reserved."

It is interesting to note that in J. D. MELL, et al., 50 L.D. 308 (1924) public lands withdrawn and acquired were treated the same as regards leases for grazing and agricultural purposes, but that there was a distinction for leasing purposes on the theory that successful prospecting would allow leases with rights of

renewal which would indefinitely withhold the land from use in the reclamation project for which the land was acquired. The decision stated, at page 313, that "in the case of private lands acquired by purchase or condemnation, said lands are from the outset definitely segregated from the public domain." The proceeds from the land would by the provisions of the leasing act, be applied in a manner inconsistent with the declared policy of Congress with respect to acquisition of such lands, namely, that all proceeds from the lands so purchased should be covered into the reclamation fund, as per the Act of 1902. Of major importance is the fact that land conveyed by the state was treated in a similar manner to original public domain which had been withdrawn for purposes of establishing the reclamation project.

Mr. Justice Holmes observed that "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." HYDE vs. UNITED STATES, 225 U.S. 347, 384, 391 (1912).

The late Judge Frank said in UNITED SHIPYARDS vs. HOEY, 131 F.2d 525, 526-527 (C.A.2) (1942): "... some of the greatest errors in thinking have arisen from the mechanical, unreflective, application of old formulations--forgetful of a tacit 'as if'--to new situations which are sufficiently discrepant from the old so that the emphasis on the likenesses is misleading and the neglect of the difference leads to unfortunate or foolish consequences. In governmental or business administration, such neglect, when it occurs, provokes justifiable irritation at 'bureaucracy;...'"

Such is the nature of Defendants' insistence that the term "acquired

land," when applied to the land involved in this litigation, must of itself lead to a denial of allotment of the land to Plaintiffs.

There is no overriding public policy requiring that land fitting within the definition of acquired land be disposed of by GSA. Acquired land is presently available to Indians on reservations containing acquired land (42 Stat. 1246). In fact, the only reason GSA is given jurisdiction of even improved real property is because the Department of the Interior traditionally deals with unimproved land and is not equipped to handle improved real estate.

Article IV, Section 3, Clause 2, of the United States Constitution says:

"The Congress shall have power to dispose of and make  
all needful rules and regulations respecting the Territory  
or other property belonging to the United States;"

This provision of the Constitution clearly gives Congress this power to take the land out of the jurisdiction of GSA as they have done by virtue of the 1958 amendment to Section 472(d) of the Surplus Property Act and to make this land available to Plaintiffs under Section 4 of the General Allotment Act.

The fact that unappropriated, unimproved real property should be administered by the Department of the Interior is further reflected by the following excerpt from page 6 of the Federal Property and Administrative Services Act of 1949, as amended. GSA, Floete. (Prepared April 1, 1956 by office of General Counsel GSA)

"1952 amendment thus means that lands previously withdrawn  
or reserved from the public domain for other governmental  
use shall also be treated as public domain and not as property



under the Act when the Administrator, with the concurrence of the Secretary of the Interior, determines that they are suitable for return to the public domain for disposition under the general public land laws because such lands are not subject to the Act in the absence of such a determination. Excess lands, originally withdrawn or reserved from the public domain, which are unimproved or contain only minor improvements, can more effectively be disposed of under the public land laws which operate with respect to the balance of the public domain lands. Lands which have been so extensively improved as substantially to change their character can be better disposed of under the act. " (emphasis ours)

On the basis of the foregoing argument, Plaintiffs respectfully request that the Final Judgment and Decree in this cause be reversed and that this Honorable Court issue an order enjoining General Services Administration from continuing with their threatened sales of land selected by Plaintiffs for allotment.

Respectfully submitted,

DONALD JAY SOLOMON

Attorney for Plaintiffs (Appellants)

## CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: September 22, 1965

DONALD JAY SOLOMON

Attorney for Plaintiffs (Appellants)





IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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R. B. RANDS, ET UX., APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

---

BRIEF FOR THE APPELLEE

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EDWIN L. WEISL, JR.,  
Assistant Attorney General.

SIDNEY I. LEZAK,  
United States Attorney,  
Portland, Oregon, 97207.

JOSEPH E. BULEY,  
Assistant United States Attorney,  
Portland, Oregon, 97207.

ROGER P. MARQUIS,  
A. DONALD MILEUR,  
Attorneys, Department of Justice,  
Washington, D. C., 20530.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

---

No. 20280

R. B. RANDS, ET UX., APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

---

BRIEF FOR THE APPELLEE

---

OPINIONS BELOW

The opinion of the district court, dated October 16, 1963, denying appellants' motion to amend their notice of appearance, is reported at 224 F.Supp. 305 and is found at pages 35-37 of the record. The court's memorandum of October 12, 1964, deciding the effect of the navigational servitude on just compensation, is found at R. 38-39.



## JURISDICTION

The district court had jurisdiction over the condemnation proceedings instituted by the United States under 28 U.S.C. sec. 1358. The judgment, based on the verdict for Tract 2514 and the stipulation as to compensation for Tract 2403, was entered April 1965 (R. 68). The appellants filed their notice of appeal on June 4, 1965 (R. 69). The jurisdiction of this Court rests on 28 U.S.C. sec. 1291.

## QUESTIONS PRESENTED

1. Whether the condemnation of land was for a public use in a constitutionally authorized project.
2. Whether lands condemned in the exercise of the navigational servitude must be valued without regard to the potential use of the lands as a port site based upon their riparian location.

## STATEMENT

In this condemnation suit, property was taken for construction of the John Day Lock and Dam Project on the Columbia River for multiple purposes of flood control, river improvement and hydroelectric development. Included in the taking were

appellants' lands, described as Tract 2403 containing 121 acres and Tract 2514 containing 139 acres (R. 5, 41). Both tracts are riparian to the Columbia River. The complaint and declaration of taking were filed on August 13, 1963 (R. 82). On the same date, appellants were sent a notice of the filing of the complaint, which further stated (App. A):

You are further notified that if you have any objection or defense to the taking of your property you are required to serve upon plaintiff's attorneys at the address herein designated within twenty days after personal service of this notice upon you \* \* \* an answer \* \* \* stating all your objections and defenses to the taking of your property. A failure so to serve an answer shall constitute a consent to the taking and to the authority of the Court to proceed to hear the action and to fix the just compensation and shall constitute a waiver of all defenses and objections not so presented.

Appellants filed a notice of appearance and a motion for partial distribution of funds on September 3, 1963 (R. 82). No defense or objection to the taking was stated in the notice of appearance or in the motion (R. 28). On September 27, 1963, appellants filed a motion to permit them to call their notice of appearance an "answer" and to allege defenses and objections to

the taking of their property (R. 31). By its opinion and order, the district court ruled that it was without authority to extend the 20 days allowed by Rule 71A(e) within which to file an answer objecting to the condemnation of property (R. 35-37).

The opinion continued (R. 37):

It is my belief that neither Rule 6(b) nor Rule 60(b), apply to this particular problem. Assuming, however, that such rules apply, United States v. 1108 acres of land, etc., 25 F.R.D. 205, I find that the showing made in support of this motion is insufficient to grant defendants relief under such rules. Furthermore, if I have discretion, I would exercise that discretion against the allowance of the motion for the reason that the defendants made no attempt to raise the question until after a substantial portion of the property had been transferred to the State of Oregon.

Later in the course of the proceedings, the question arose as to whether any element of value attributable to the possible use of the lands taken as a potential port site for future development should be considered. The district court, in its memorandum opinion of October 12, 1964, decided this question in the negative (R. 38-39). Although the land taken was unimproved, the court conceded, arguendo, that "Defendants'

lands border the high water mark of the Columbia River for a considerable distance, and, for the purposes of this opinion, it is conceded that at least one site could be utilized as a port"<sup>1/</sup> (R. 38). The opinion continued (R. 38-39):

I am unable to distinguish between the value of land as a site for hydroelectric power purposes, the issue before the court in United States v. Twin City Power Co., 350 U.S. 222 (1955), and the value of land as a site for port operations. The successful operation of each depends on the flow of the stream. A port without water is no more susceptible to successful operation than would be a hydroelectric plant without its source of power. It is my belief that the value, if any, for port purposes is subject to the overriding navigational services [sic servitude] of the United States, which permits the appropriation of any such a property right by the United States without compensation.  
\* \* \*.

At the trial on the issue of just compensation for Tract 2514, the appellants contended that the highest and best use of the property was in part for sand and gravel, in part for

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<sup>1/</sup> The concession did not, of course, include the further issues whether adaptability of this particular land for the purpose was so imminent as to affect market value of the land in its then condition.



port site and the remainder for agricultural uses (R. 41). The district court abided by its earlier ruling which eliminated port site value from the consideration of the jury (R. 42). Based on agricultural and sand and gravel uses, appellants' witnesses testified that the value of the tract was between \$103,000 and \$150,000. The Government, basing its value entirely on agricultural uses, presented witnesses who testified the tract had a value of between \$4,980 and \$5,660. Among the comparable sales was the sale of that portion of Tract 2514 (52.4 acres) containing the sand and gravel bar to the appellants on October 1961, for \$2,500 (R. 45). The jury returned a verdict of \$7,000 (R. 66). The appellants made an offer of proof on the value of their lands for a port site (R. 48-65). Included in the offer of proof was an affidavit by a tug boat captain who stated that "I do not think it would be at all unreasonable to pay not less than \$50,000 for the Castle Rock port site if the same were for sale" (R. 55). After the jury trial, the appellants and the Government entered into a stipulation that just compensation for Tract 2403 was \$2,420 inclusive of interest (R. 67). Judgment was accordingly entered for \$9,420 for both tracts, and this appeal followed (R. 68).

## SUMMARY OF ARGUMENT

### I

The land was taken for public use in a constitutionally authorized project. Since the Government's right to take in this case in plain, it was not an abuse of discretion for the district court to refuse to allow the appellants permission to make a tardily presented answer contesting the Government's right to take. The only justiciable issue that could have been in the case involving the right to take was whether the Congress was acting within its constitutional powers when it authorized the Corps of Engineers to construct the John Day Lock and Dam Project and appellants do not deny this fact. Details of the execution of the constitutionally authorized project, such as how much land is needed, where the boundary line is to be, or whether the land is taken in fee rather than by easement, are legislative questions, not subject to judicial review.

### II

The district court correctly excluded port site value as an element of compensation. This case again raises the often litigated issue of how the rule that privately owned riparian lands carry with them no vested right of access to the navigable



stream is to be taken into consideration when determining just compensation. Both United States v. Virginia Electric Co., 365 U.S. 624 (1961), and United States v. Twin City Power Co., 350 U.S. 222 (1956), hold that just as the navigational privilege permits the Government to reduce the value of riparian lands by denying the owner access to the stream without compensation for his loss, it also permits the Government to disregard the value arising from this same fact of riparian location in compensating the owner when fast lands are taken. Persons who have bought and sold riparian property have consistently been advised by the courts that, as against the United States, riparian rights of access to navigable waters cannot be bought and sold.

Appellants fail in their attempt to distinguish Twin City and Virginia Electric Co. There is no logical distinction between power site value and port site value, as both are controlled by the same underlying concept of value based on riparian location. These cases do not rest on their individual facts as to how speculative or remote the proposed projects were, nor on the degree to which Congress has controlled the subject matter by legislation. Nor is the argument that Congress might have

waived its rights in the navigational servitude or contemplated creating these riparian owners different from others supported by the two statutes which appellants cite. The very long and specific legislative and administrative history of such an incident which was shown in United States v. Gerlach Livestock Co., 339 U.S. 725 (1950), is completely lacking here.

## ARGUMENT

### I

#### THE LAND WAS TAKEN FOR PUBLIC USE IN A CONSTITUTIONALLY AUTHORIZED PROJECT

Appellants complain that they were not allowed to file tardily an answer raising their objections to the Government's right to take Tracts 2403 and 2514. It appears from appellants' Motion to Amend, with attached affidavit (R. 31-34), and their brief (pp. 47-48) that they contend the Government is taking more land than it needs for the John Day Lock and Dam, and that such land after the taking will be sold to the State of Oregon which will lease it to the Boeing Company, "a private, profit making company." Reference to the map attached to the declaration of taking shows that where the Government in the case of

Tract 2514 will overflow the entire ownership, it has elected to take the land in fee, rather than only a flowage easement up to the anticipated high water mark (R. 20). The same is true for Tract 2403, except that the high water contour does not include the two far corners of that tract, and again the Government has elected to take the entire ownership in fee.

Under these circumstances, the Government's right to take is too clear to admit of quibbling about procedural details on whether the district court abused its discretion in refusing to permit appellants to amend their notice of appearance. Certainly, there would be no such abuse if, as we show, the proposed amendment would not present a justiciable issue. We assume that appellants do not contest that the Congress of the United States was acting within its constitutional powers when it authorized the Corps of Engineers to construct the John Day Lock and Dam Project.<sup>2/</sup> Pub.L. 87-880, 76 Stat. 1216, 1217; Pub.L. 516, 81st Cong., 64 Stat. 163, 179, authorizing project

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<sup>2/</sup> Appellants concede in their brief that "there is no doubt that the purposes of the John Day Dam include aid to navigation \* \* \*" (Br. 37).

is detailed in H.Doc. No. 531, 81st Cong. (Cong. Doc. Ser. No. 1429). When this obvious fact is acknowledged, it settles the only justiciable issue in the case insofar as the right to take is concerned. The details of the execution of the constitutionally authorized project, such as how much land is needed, where the particular boundary lines are to be drawn or what estate or interest in the land taken is appropriate for the project, are questions which are not subject to judicial review.<sup>3/</sup> In one of the leading cases in this field, Berman v. Parker, 348 U.S. 26, 35-36 (1954), the Supreme Court holds that:

It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a

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3/ There are a few cases which in dictum state a "bad faith" exception to the general rule. The question of whether there is such an exception has been discussed at great length in a recent Ninth Circuit case and will not be repeated here. See Southern Pacific Land Co. v. United States, No. 19882, now pending. A copy of this brief will be supplied appellants. It is sufficient for our present purposes to state that no appellate court has ever upheld a finding of bad faith by a government officer in the taking of land and, in absence of bribery, corruption, or other such gross malfeasance in office, no such exception exists. In any event, in this case the affidavit in support of appellants' motion (R. 32-33) alleges no facts even remotely indicating bad faith.



particular tract to complete the integrated plan rests in the discretion of the legislative branch. See Shoemaker v. United States, 147 U.S. 282, 298; United States ex rel. T.V.A. v. Welch, *supra*, 554; United States v. Carmack, 329 U.S. 230, 247.

In the Shoemaker case, which the Supreme Court cites, it is stated (147 U.S. at p. 298):

The adjudicated cases likewise establish the proposition that while the courts have power to determine whether the use for which private property is authorized by the legislature to be taken, is in fact a public use, yet, if this question is decided in the affirmative, the judicial function is exhausted; that the extent to which such property shall be taken for such use rests wholly in the legislative discretion, subject only to the restraint that just compensation must be made.

In the planning, construction and operation of a project such as the John Day Lock and Dam, there are an infinite number of details on engineering feasibility, financial cost to taxpayer, economic effect on the community, public policy and others which are intricately interwoven to produce the administrative decision on how much land should be taken or what estate should be taken. For example, in order to minimize severance damages and administrative costs, it has at various times been the policy of the

Corps of Engineers to take each 40-acre subdivision of a section of land where the full flood pool line covered any part of such 40-acre tract. See United States v. Crance, 341 F.2d 161, 162 (C.A. 8, 1965).

Indeed, in the present case, one may surmise that the administrative decision to condemn the entire fee ownership, rather than a flowage easement, and ~~to sell the surplus land~~ to sell the surplus land not needed for the project to the State of Oregon was motivated by a desire to further the overall objectives and to reduce the cost of the entire project (R. 58). See Section 108, Pub.L. 86-645, 74 Stat. 480, 486, 33 U.S.C. sec. 578, which authorizes disposals of this type. In a similar situation, the Supreme Court said "In passing upon the authority of the T.V.A. we would do violence to fact were we to break one inseparable transaction into separate units. We view the entire transaction as a single integrated effort on the part of T.V.A. to carry on its congressionally authorized functions." United States ex rel. T.V.A. v. Welch, 327 U.S. 546, 552-553 (1946). And later in the same opinion the Court says, at page 554: "The cost of public projects is a relevant element in all of them, and the Government, just as anyone else, is not required to proceed oblivious to elements of cost."



This Court has expressed similar views in a river improvement project case where the taking was changed over the landowner's objections from an easement to a fee. Simmonds v. United States, 199 F.2d 305 (C.A. 9, 1952). In Simmonds this Court said (p. 306):

Discretion regarding the acquisition of property by the exercise of the power of eminent domain, rather than by direct purchase, lies with any federal officer acting under the mandate of Congress. Congress has established as the standard for the exercise of discretion the "opinion" of an authorized official that condemnation would be "necessary or advantageous to the Government". [Italics ours] 40 U.S.C.A. § 257. In exercising its power to condemn, "the government, just as anyone else, is not required to proceed oblivious to elements of cost." United States ex rel. Tennessee Valley Authority v. Welch \* \* \*. Therefore, where the statute which is being implemented contains Congressional authority to take property by eminent domain proceedings (here the River and Harbor Act), the officer authorized to act is under the duty of exercising his discretion as to the estate he elects to take. His discretion so exercised is subject to be attacked only for plain abuse or fraudulent action.

## II

THE DISTRICT COURT CORRECTLY  
EXCLUDED PORT SITE VALUE AS  
AN ELEMENT OF COMPENSATION

This case again raises the often litigated issue of the nature of the public rights in a navigable body of water

Specifically, where privately owned riparian lands are enhanced in value because they have access to the public waterway, and such lands are needed to improve the navigability of the stream, must the Government pay the increment in value added by the element of access? Stated in another way, how is the fact that the privately owned riparian lands carry with them no vested right of access to the navigable stream to be taken into consideration when determining just compensation?

Where the subject is riparian land on navigable streams, there are numerous cases which illustrate the limited nature of the private rights which a person can acquire in access to a navigable stream. The Supreme Court's latest pronouncement on this subject is as good a summary as may be found. United States v. Virginia Electric Co., 365 U.S. 624 (1961). The Court there said, at page 629:

But though the Government's navigational privilege does not extend to lands beyond the high-water mark of the stream, the privilege does affect the measure of damages when such land is taken. In United States v. Twin City Power Co., 350 U.S. 222, we held that the compensation awarded for the taking of fast lands should not include the value of the land as a site for hydroelectric power operations. It was pointed out that such value, derived from

the location of the land, is attributable in the end to the flow of the stream--over which the Government has exclusive dominion. 350 U.S., at 225-227. Thus, just as the navigational privilege permits the Government to reduce the value of riparian lands by denying the riparian owner access to the stream without compensation for his loss, United States v. Commodore Park, 324 U.S. 386, 390-391; Scranton v. Wheeler, 179 U.S. 141, 162-165; Gibson v. United States, 166 U.S. 269, 276, it also permits the Government to disregard the value arising from this same fact of riparian location in compensating the owner when fast lands are appropriated.

Although the Constitution does not grant property rights in a navigable stream to the Government, it does confer a power that "is a dominant one which can be asserted to the exclusion of any competing or conflicting one." United States v. Twin City Power Co., 350 U.S. 222, 224-225 (1956). Persons who have bought and sold riparian property have for many decades been consistently advised by the courts that they held their titles subject to this overriding power of the United States to improve navigability without payment of compensation for destruction of property rights in the bed of the stream or for denial of access to the stream. Washington Water Power Co. v. United States, 135 F.2d 541, 543 (C.A. 9, 1943).



In Gibson v. United States, 166 U.S. 269 (1897), an improvement for navigation of the Ohio River destroyed plaintiff's access to the channel of the River. The Court, in denying plaintiff compensation, said (p. 276):

Moreover, riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the Government in that regard. \* \* \*

In short, the damage [i.e., the denial of access] resulting from the prosecution of this improvement of a navigable highway, for the public good, was not the result of a taking of appellant's property, and was merely incidental to the exercise of a servitude to which her property had always been subject.

Numerous other cases since have held that a riparian owner has no compensable interest in his access to a navigable stream. Perhaps the leading case on this subject is United States v. Commodore Park, 324 U.S. 386 (1945), where the Court held (p. 391): "Riparian rights of access to navigable waters cannot, as against the government's power to control commerce, be bought and sold." At the same time, the Court reiterated the holding of Gibson v. United States, supra, that the riparian owner's

property "was always subject to" the Government's dominant servitude. Ibid. As specifically applicable to the present case, the Court said, "In short, as against the demands of commerce, an owner of land adjacent to navigable waters, whose fast lands are left uninvaded, has no private riparian rights of access to the waters to do such things as 'fishing and boating and the like,' for which rights the government must pay." [Emphasis supplied.] If it be sought to distinguish Commodore Park because in the present case fast lands were invaded, the answer is that the owners have been allowed compensation for their lands for all elements of value except their private riparian right of access. It is for these rights that the Court in Commodore Park <sup>4/</sup> says the Government need not pay.

The basic teaching of these cases is the owner of land riparian to a navigable stream does not have, as against the United States, a right to the continuation of that stream in its

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4/ In Commodore Park, the Court recognized that the claimant owned the bed of the stream under Virginia law (324 U.S. at p. 390) but that gave him no right to compensation because of the Government's improvements.

natural state. Consequently there is no right to recover--as  
the taking of a vested right--when that natural condition is  
altered. See also: Borough of Ford City v. United States, 345  
2d 645, 647 (C.A. 3, 1965); City of Demopolis, Ala. v. United  
States, 334 F.2d 657 (C.Cls. 1964); City of Eufaula, Ala. v.  
United States, 313 F.2d 745 (C.A. 5, 1963).

The most recent pronouncements of the Supreme Court  
have shown that when the fast lands of the riparian owner are  
taken by eminent domain, those elements of value attributable to  
the location of the fast lands on a navigable stream both can and  
must be excluded in determining fair market value. United States  
Twin City Power Co., 350 U.S. 222 (1956); United States v.  
Virginia Electric Company, 365 U.S. 624 (1961). Those cases are  
controlling on the present case, and were correctly relied on by  
the district court to exclude evidence of port site value for  
the land here condemned (R. 38-39).

Appellants attempt to distinguish Twin City and Virginia  
Electric Co., factually because they involve hydroelectric sites  
rather than port sites (Br. 22 et seq.). One is reminded of the  
concurring opinion of Mr. Justice Douglas in Silverman v. United  
States, 365 U.S. 505, 512 (1961): "My trouble with stare decisis



in this field [invasion of privacy] is that it leads us to a matching of cases on irrelevant facts." Whether the value is for a port site or a hydroelectric site, both are due to location of the fast land next to a navigable stream, the access to which depends solely on the Government. "What the Government can grant or withhold and exploit for its own benefit has a value that is peculiar to it and that no other user enjoys." United States v. Twin City Power Co., supra, at p. 228. This logic applies equally to both potential uses.

In the same attempted distinction, appellants make much of the use of such words as "moving water" and "power in the flow." These phrases and ideas occur quite naturally in an opinion discussing hydroelectric dam sites. But it is surely not correct that whether the United States pays location value for fast lands next to a navigable stream depends on whether the current of the stream is moving or quiescent.

Next, appellants attempt to distinguish Twin City and Virginia Electric on the ground that there were fewer contingencies in using the land here condemned as a port site than there were in using the land in those cases as hydroelectric sites

Br. 23). It is true that a proposed use of land may be so contingent or speculative or remote that value for such proposed use must be excluded in determining just compensation. United States ex rel. T.V.A. v. Powelson, 319 U.S. 266, 275 (1943); Powelson v. United States, 292 U.S. 246, 256 (1934); Continental and Co. v. United States, 88 F.2d 104, 110 (C.A. 9, 1937), cert. den., 302 U.S. 715. However, that rule was not controlling in either Twin City or Virginia Electric. To the contrary, in Virginia Electric the agricultural value which the Supreme Court allowed was to be based "'on the probability or improbability of actual exercise of the [flowage] easement by the . . . Power Company or its assigns.'" 365 U.S. at p. 635.

Appellants also attempt to distinguish the present case from Twin City and Virginia Electric because the federal statutory requirements for erection of hydroelectric dams on navigable rivers are different from statutes governing the building of ports (Br. 23 et seq.). Neither the Twin City nor Virginia Electric opinion is founded on any such ground. We are concerned here, however, with the measure of just compensation required by the Fifth Amendment, not with the extent that Congress has exercised its power over interstate commerce by enactment of statutes.

Irrespective of the statutory scheme which Congress has constructed for either sort of facility, its plenary power over both is co-extensive and derives from the same constitutional authority to regulate commerce with foreign nations and among the several states. Indeed, since port sites are more directly connected with fostering navigation than dam sites, it could be argued that Congress has the greater degree of control over port sites, rather than vice versa as appellants argue.

Finally, appellants argue that, as in United States v. Gerlach Livestock Co., 339 U.S. 725 (1950), it was the intent of Congress to pay compensation regardless of whether any was owing pursuant to the constitutional mandate (Br. 36-43). Appellants base this argument principally on Section 1(b) of the Act of December 22, 1944, 58 Stat. 887, 889, 33 U.S.C. sec. 701-1(b), which states in substance that it is the policy of Congress in exercising jurisdiction over the Nation's rivers that the use of water for navigation west of the 98th meridian shall only be such use as does not conflict with domestic, municipal, stock water, irrigation, mining or industrial uses. Assuming that this statutory provision is applicable to the present project,<sup>5/</sup> the relevant

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<sup>5/</sup> See Section 202, Act of May 17, 1950, 64 Stat. 170.

of the provision to the issue of whether the United States should pay for port site value is not readily apparent.

Also not clear are the relevance of the several sections of the Submerged Lands Act of 1953, 67 Stat. 29, 43 U.S.C. sec. 1301 et seq., on which appellants rely as "reinforcing" the Act of December 22, 1944, supra. The purpose of the Submerged Lands Act was to establish proprietary title to the states and their grantees of certain lands beneath navigable waters. The record in this case does not indicate that the land condemned here involves title which was transferred by the Submerged Lands Act. That Act does not purport to change the measure of compensation to be paid for any lands other than those transferred. Insofar as the Government's rights under the Navigation Servitude and the Commerce Clause are mentioned, it is directly contrary to appellants' contention. That Act expressly provides that (Sec. 1314(a)), 67 Stat. 32, 43 U.S.C. sec. 1314(a)):

The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership \* \* \*.



Thus, instead of indicating a congressional policy to pay for the exercise of the navigational servitude as appellants argue, the expressed intent is to the contrary to retain all its rights and powers in navigable waters. There is completely lacking here any of the long administrative history explicitly related to the specific project such as was involved in United States v. Gerlach Livestock Co., 339 U.S. 725 (1950). There is therefore absolutely no basis for saying that Congress intended to treat the riparian owners in this case differently from any other riparian owners, or for granting to them a waiver of federal rights. Cf. United States v. Grand River Dam Authority, 363 U.S. 229, 235 (1960).

#### CONCLUSION

For the above reasons, the judgment of the district court is correct and should be affirmed.

Respectfully submitted,

EDWIN L. WEISL, JR.  
Assistant Attorney General.

SIDNEY I. LEZAK,  
United States Attorney,  
Portland, Oregon, 97207.

JOSEPH E. BULEY,  
Assistant United States Attorney,  
Portland, Oregon, 97207.

ROGER P. MARQUIS,  
A. DONALD MILEUR,  
Attorneys, Department of Justice,  
Washington, D. C., 20530.

OCTOBER 1965

CERTIFICATE OF EXAMINATION OF RULES

I certify that I have examined the provisions of Rules 18 and 19, C.A. 9, and that in my opinion the tendered brief conforms to all requirements.

---

A. DONALD MILEUR  
Attorney, Department of Justice  
Washington, D. C., 20530



APPENDIX A  
IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES FOX, et al.,

Defendants,

CIVIL NO. 63-380

N O T I C E

TO: James Fox, Emma Fox, George L. Fox, Lucile H. Fox,  
A. H. Harding, Esther E. Harding, H. G. Gosney, doing  
business as Umatilla Sand and Gravel Company, George Shane,  
R. B. Rands, Josephine Rands, Ferdinand Emberger, Jane Doe  
Emberger, Royal H. Rands, Louise Rands, West Extension  
Irrigation District, Northern Pacific Railway Company,  
Fannie Slevin, Clyde Hoyt, Nellie Hoyt, James F. McMillin,  
Madeline McMillin, Robert Hoyt, Thula Hoyt, Marvin Simmons,  
Norma J. Simmons, State of Oregon, Gilliam County, Morrow  
County, Sherman County, and Umatilla County, Oregon:

You and each of you are hereby notified that a com-  
plaint in condemnation has heretofore been filed in the office  
of the Clerk of the above named Court in an action to condemn  
the fee simple title, subject, however to existing easements  
for public roads and highways, public utilities, railroads and  
pipe lines, in and to the land more particularly designated and  
described in Exhibit "A" hereto attached and by this reference  
made a part hereof.

The authority for the taking is:

Act of February 26, 1931 (46 Stat. 1421, 40 U.S.C., 258a), and acts supplementary thereto and amendatory thereof;

Act of April 24, 1888 (25 Stat. 94, 33 U.S.C., 591);

Act of March 1, 1917 (39 Stat. 948, 33 U.S.C., 701);

Act of May 17, 1950 (Public Law 516, 81st Congress);

Act of October 24, 1962 (Public Law 87-880);

You are further notified that if you have any objection or defense to the taking of your property you are required to serve upon plaintiff's attorneys at the address herein designated within twenty days after personal service of this notice upon you, exclusive of the day of service, an answer identifying the property in which you claim to have an interest, stating the nature and extent of the interest claimed and stating all your objections and defenses to the taking of your property. A failure so to serve an answer shall constitute a consent to the taking and to the authority of the Court to proceed to hear the action and to fix the just compensation and shall constitute a waiver of all defenses and objections not so presented.

You are further notified that if you have no objection or defense to the taking of your property you may serve upon

plaintiff's attorneys a notice of appearance designating the property in which you claim to be interested, and thereafter you shall receive notice of all proceedings affecting the said property.

You are further notified that trial by jury of the issue of just compensation is demanded by plaintiff. At the trial of the issue of just compensation whether or not you have previously appeared or answered, you may present evidence as to the amount of compensation to be paid for the taking of your property and you may share in the distribution of the award.

Dated at Portland, Oregon, this 13th day of August, 196

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JOSEPH E. BULEY

Assistant United States Attorney

No. 20,283  
United States Court of Appeals  
For the Ninth Circuit

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DALE MATHIS,

*Appellant,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

---

APPELLEE'S ANSWERING BRIEF

---

JOHN W. BONNER,

United States Attorney,

ROBERT S. LINNELL,

Assistant United States Attorney,

305 Post Office Building,

Las Vegas, Nevada,

*Attorneys for Appellee.*

FILED

OCT 14 1965

FRANK H. SCHWAB, CLERK



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No. 20,283

**United States Court of Appeals  
For the Ninth Circuit**

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DALE MATHIS,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

---

**APPELLEE'S ANSWERING BRIEF**

---

**STATEMENT OF JURISDICTIONAL FACTS**

The indictment herein charged a violation of Title 21, United States Code, Section 176(a), in each of two counts, offenses against the United States. Under Title 18, United States Code, Section 3231, the United States District Court had original jurisdiction. Upon the jury's verdict of guilty as to each of the two counts, the Appellant was sentenced. It is conceded that this Court has jurisdiction over appeals from such final decisions of a District Court under the provisions of Title 28, United States Code, Section 1921, and by virtue of Rule 27(a), Federal Rules of Criminal Procedure.

**STATEMENT OF THE CASE**

This is an appeal from the conviction of the Appellant, Dale Mathis, in the United States District Court for the District of Nevada.

Count I of the Indictment upon which the conviction was based charged Appellant with receiving, concealing, and facilitating the transportation and concealment of marihuana on or about July 10, 1964. Count II dealt with Appellant's possession of a portion of a marihuana cigarette on or about September 17, 1964 (R. 7, 8)<sup>1</sup>.

Appellant has specified as error the Court's permitting the witness Shearer to be questioned in the presence of the jury concerning Exhibits 10 and 11 for identification, the giving of Court's Instruction A relative to Exhibits 10 and 11 for identification, and the trial court's failure to grant Appellant's Motion For Judgment of Acquittal or Appellant's Alternative Motion For a New Trial (Opening Brief, pp. 6, 7, 8).

Factually, a Federal Narcotic Agent, Richard Salmi, was introduced to an informant produced by the Sheriff's Department of Clark County, Nevada on July 9, 1964 (T. 75).<sup>2</sup> The informant's name was Harrison Allan Shearer. The purpose of his introduction to Agent Salmi was to introduce to Salmi dope traffickers in North Las Vegas, Nevada (T. 100).

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<sup>1</sup>"R." as used herein refers to the Record on Appeal.

<sup>2</sup>"T." as used herein refers to the Transcript of Testimony.

Approximately an hour after their initial meeting, Shearer took Agent Salmi to the residence of Appellant's parents in North Las Vegas and there introduced the agent to the Appellant (T. 75, 76). There followed discussion of marihuana purchases (T. 76, 77) and then the agent, informant, and Appellant drove in the agent's vehicle to a park in North Las Vegas, this being on July 10, 1964 at approximately 1:00 o'clock a.m. (T. 75). After a chance meeting with some acquaintances of the Appellant and informant, and a brief encounter with the police (T. 27, 80), the agent followed the Appellant and the informant into a playground area containing a shed-type playhouse open at both ends (T. 81). Appellant walked into the shed, followed immediately by the agent, and the agent observed the Appellant reach up and obtain a vial from the roof of the playhouse, leave the playhouse, and hand the vial to the informant (T. 81, 82).

At this point, Appellant Dale Mathis said:

"Let's light up."

At the same time, he produced some cigarette papers, but the agent was successful in discouraging any further activity of this nature (T. 82). The three men then left the park area, entered the agent's car and drove to the Bonanza Club in North Las Vegas. There, at approximately 2:00 o'clock, a.m., on July 10, 1964, they had refreshments and further discussed the purchase of kilogram quantities of marihuana (T. 82, 83).

The agent next drove Appellant back to his house, arriving somewhere around 3:00 o'clock, a.m., on July

10, 1964, and engaged in additional conversation concerning marihuana purchases, at which point Appellant left the car (T. 84, 85). After Appellant left the car, the informant handed to the agent the vial Appellant had given him. Shortly thereafter, the agent let the informant out of the car and returned to his hotel (T. 86, 87).

The contents of the plastic vial and the plastic vial, itself, were admitted into evidence as plaintiff's Exhibit No. 4 and Exhibit No. 5, respectively (T. 126).

On July 12, 1964, the informant executed a statement (plaintiff's Exhibit 10 for identification) in the presence of Agent Salmi, another Narcotic Agent, and a Clark County Deputy Sheriff (T. 95, 96).

The Appellant was arrested in the early morning hours of September 17, 1964, and during the subsequent booking at the Clark County, Nevada jail a partially smoked marihuana cigarette was discovered in the pocket of his trousers (T. 146). It is this cigarette (Exhibit 9) with which Count II of the Indictment is involved.

On March 9, 1965, Appellant's Motion To Suppress Evidence was filed (R. 9), Appellant alleging illegal seizure and an insufficient Commissioner's Complaint. In support of his motion, Appellant, on April 2, 1965, filed the affidavit of the informant, Harrison Allan Shearer. In the affidavit, the informant stated, in substance, that he and the Appellant had purchased catnip, a vial of which they had placed in Fantasy Park

previous to going there with Agent Salmi (R. 11, 12). Appellant's motion to suppress was denied during the course of the trial (T. 124).

Informant Shearer was called as a witness for Appellee, and following some preliminary testimony testified as follows (T. 34):

“Q What happened at Fantasy Park?

A Nothing that I know of.”

At this point in the trial, the previous statement of the informant (Exhibit 10 for identification) was handed to him. He indicated that he had executed it after reading it, but that he didn't really voluntarily sign it (T. 34, 35). Thereupon, Government counsel requested the witness be declared hostile and that permission be granted to ask leading questions (T. 36). This request was granted by the trial court, and the prior testimony of the witness to the effect that nothing he knew of happened at Fantasy Park was substantially impeached (T. 37-40).

In addition, a letter acknowledged by the witness to have been written by him to Appellant (marked for identification as Exhibit 11) was shown to the witness. He was asked leading questions further impeaching his credibility (T. 40-43), and the Court (T. 44) without being requested permitted counsel for Appellee to quote from both Exhibits 10 and 11 for identification. Portions of the letter were quoted and the witness was questioned concerning same (T. 44-47).

The witness was cross-examined concerning both Exhibits 10 and 11 for identification (T. 62-64) and



the Court further examined the witness concerning Exhibit 10 for identification (T. 68-71).

The defendant made objection to the aforementioned questioning by the Court, as well as that by Appellee's counsel. Neither exhibit was offered into evidence.

Appellant made timely motions for judgment of acquittal at the close of the Government's case (T. 156), at the close of all the evidence (T. 222), and following the defendant's conviction (R. 18). In each case the motion was denied.

On May 24, 1965, Appellant was sentenced to the custody of the Attorney General for a period of seven years on each count of the indictment, the same to run concurrently (R. 22).

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#### **SUMMARY OF ARGUMENT**

1. The District Court committed no error in permitting the witness Shearer to be questioned in the presence of the jury concerning Exhibits 10 and 11 for identification.

2. The District Court committed no error in giving Court's Instruction A.

3. The District Court did not err in denying Appellant's Motion for Judgment of Acquittal or in the Alternative for a New Trial.

**ARGUMENT**

1. **THE DISTRICT COURT COMMITTED NO ERROR IN PERMITTING THE WITNESS SHEARER TO BE QUESTIONED IN THE PRESENCE OF THE JURY CONCERNING EXHIBITS 10 AND 11 FOR IDENTIFICATION.**

The second witness called to testify before the jury was Harrison Allan Shearer, who testified on direct examination that he met Agent Salmi in July of 1964 (T. 32); that in the early morning of July 10, 1964 he took the agent to Appellant's residence (although he also indicated elsewhere in his testimony that this occurred at 10:00 o'clock at night), and introduced the agent to the Appellant (T. 33). Shearer testified (T. 34) that he made known to the Appellant that Salmi was an agent and that after a discussion they all went to Fantasy Park.

At this point, the following testimony occurred (T. 34):

“Q. What happened at Fantasy Park?

A. Nothing that I know of.”

Shearer testified (T. 68) that he had executed a statement for the agent three or four evenings after the events of July 10, 1964. Additional testimony (T. 119) showed that this statement was given on July 12, 1964. The statement was marked for identification as plaintiff's Exhibit 10 (T. 34) and was not offered or admitted into evidence.

As stated by Appellant (Opening Brief, p. 9), on April 2, 1965, a week prior to trial, Appellant's counsel filed an affidavit of Harrison Allan Shearer in support of a previously filed motion to suppress evi-

dence (R. 11). This affidavit was to the effect that he, the informant, Shearer, and Appellant had planted catnip in a vial to trick Agent Salmi. Appellant, however, testifying in his own behalf (T. 202, 203), stated that he did not observe the purchase of any catnip, as indicated by Shearer, and that he had not in fact removed any vial from the playhouse at Fantasy Park.

Upon Exhibit 10 for identification being shown to the witness Shearer and he having acknowledged reading the same and its execution (T. 35), counsel for Appellee requested that the witness be declared hostile and to be permitted to ask leading questions, which request the trial court granted (T. 36).

Counsel for Appellee thereupon proceeded to ask Shearer leading questions, referring him on occasion to plaintiff's Exhibit 10 for identification. The informant readily testified to events occurring at Fantasy Park (of which he had previously denied knowledge) (T. 37-39).

Appellant first states (Opening Brief, p. 10) that the case does not come within the exceptions to the rule that a party may not impeach his own witness, as those exceptions are set out in *Meeks v. United States*, 9th Cir. 1950, 179 F.2d 319, but counsel does not include in his brief all of the exceptions. It is stated in *Meeks*, supra, at page 321:

“ ‘The prosecution in a criminal case may impeach a witness whom it is under a legal duty or obligation to call, *such as an available witness to the crime*, a witness who has testified before the grand jury, or a witness whom the court compels the prosecution to call.’ ” (Emphasis added.)

Next, Appellant urges (Opening Brief, p. 11) that the use of Exhibit 10 for identification was proper, provided the Government was surprised by Shearer's testimony, and in support Appellant cites *Fong Lum Kwai v. United States*, 9th Cir. 1939, 49 F.2d 19.

Appellee will readily concede that it never *vocally* asserted surprise at Shearer's testimony, and, further, that it was aware of Shearer's previously filed affidavit. Nevertheless, Appellee urges that the rule is otherwise than as asserted by the Appellant.

The trial court may in its discretion, if satisfied that surprise exists, permit leading questions and examination of a witness with respect to prior conflicting statements (and it was obvious to the trial court, the informant's affidavit (R. 11), referring to events which occurred at Fantasy Park, having been submitted prior to trial, and the informant having acknowledged his signature on plaintiff's Exhibit 10 for identification, that surprise existed at the point of Shearer's testifying that nothing he could remember occurred at Fantasy Park). Certainly, the granting of the request to lead the witness would not, under such circumstances, constitute an abuse of the Court's discretion.

In *Weaver v. United States*, 9th Cir. 1954, 216 F.2d 23, the witness had given a statement to the Federal Bureau of Investigation and thereafter had refused to testify in accordance with that statement before a grand jury. When, at the trial, the Government sought to impeach the witness, the defense argued there could be no surprise. This Court stated, at page 25:

“The Government, however, had a right to anticipate that, under oath and in court, she would testify in accordance with her story to the Federal Bureau of Investigation.”

Appellant further relies upon this Court’s decision in *Sullivan v. United States*, 9th Cir. 1928, 28 F.2d 147 (Opening Brief, p. 13).

That case is not, it is respectfully submitted, analogous to the case at bar. There three witnesses had, while in prison, joined in a statement. When the first of the three witnesses failed to testify as anticipated, the Court held that the testimony of the other two witnesses was incompetent.

The Court’s attention is respectfully directed, in connection with Appellant’s position that the Government was required to vocally express surprise, to its decision in *Bieber v. United States*, 9th Cir. 1960, 276 F.2d 709, where it was stated at page 713:

“If the Court is satisfied that the ‘surprise’ exists, either from the statement of counsel *or otherwise*, that is all that is required to permit the examination of the witness as to his prior contradictory statement.” (Emphasis added.)

The question of impeaching one’s witness by use of a prior contradictory statement was the subject of a scholarly discussion by Judge Hand in *United States v. Allied Stevedoring Corp.*, 241 F.2d 925, at page 932.<sup>3</sup>

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<sup>3</sup>In view of the length of the discussion referred to, it is set forth in an appendix hereto at page i, *infra*.



Appellant argues (Opening Brief, p. 13) that the Government's purpose in using Exhibit 10 for identification, in addition to neutralizing the testimony of Shearer, was to place otherwise inadmissible evidence before the jury. In response, Appellee asserts that the sole objective was to place the witness in a position so as to result in the jury's knowing as much as possible about his credibility, thus permitting the jury to make an accurate appraisal of his testimony. The Appellant should not be heard to complain of Shearer's impeachment by the prosecution since he also had an interest in destroying Shearer's credibility. Shearer had given an affidavit (R. 11) and testified before the jury (T. 512) on cross-examination that he had placed a vial of catnip in the playhouse, that Appellant was aware of this, and that Appellant had removed it from the playhouse in the agent's presence.

Appellant, himself, then testified (T. 202, 203) that he had not seen Shearer purchase any catnip, nor had he in fact obtained any vial from the playhouse. Thus, it is argued, Appellant was not prejudiced by Shearer's impeachment.

Appellant further argues (Opening Brief, p. 14) that the questioning of Shearer both by the Government and by the Court from Exhibit 10 for identification was error and states (Opening Brief, p. 15) that the jury saw the exhibit. It is Appellee's position that the above arguments apply as well to the action of the Court. Further, the record is clear that the jury did not see either Exhibit 10 or 11 for identification in the sense that they were allowed to read or examine the exhibits.



Moving on to plaintiff's Exhibit 11 for identification, Appellee asserts that its use had no effect other than to further impeach Shearer's credibility. It was clearly established by examination (T. 45-47) of Shearer from the letter marked for identification as plaintiff's Exhibit 11 he had expressed an intent to testify either for the Government or for the Appellant, depending upon how the Appellant treated him.

With respect to both Exhibits 10 and 11 for identification, any prejudicial effect against the Appellant was rectified by the Court's Instructions (T. 263-265):

"Now, I should comment, I think, on this instruction. We talked about a Government agent, an informer, decoy of some sort. For the purpose of this case, Mr. Shearer, Allen Shearer, should be deemed a Government agent, so when you consider the question of lawful or unlawful entrapment, this instruction that I have just read to you, treat not only Agent Salmi but treat Mr. Shearer as a Government agent.

"Now, the witness, Harrison Shearer, or Allen Shearer, whatever his full name was, was examined by counsel and by the Court as to certain portions of or quotations from two prior written statements made by him. One statement marked Exhibit 10 for Identification, but *not received in evidence*, was a statement in the handwriting of Agent Salmi signed by the witness Shearer. The other statement, marked Exhibit 11 for Identification, *also not received in evidence*, was a letter written by the witness Shearer to the defendant.

"Now, it appeared to the Court that some of the quoted portions of these two prior written state-

ments were inconsistent with the testimony of the witness Shearer given before you.

“The only purpose of so questioning witness Shearer and confronting him with portions of or quotations from his prior written statements while he was on the stand was to permit you to weigh those portions and quotations of the prior statements and his answers when questioned about the same, together with his other testimony given before you, all for the purpose of assisting you in determining what credibility and weight you may wish to give to the testimony of the witness Shearer.

“It is the exclusive province of the jury to disregard the Court’s comment that there are inconsistencies between portions of the prior written statements and the defendant’s testimony before you. The jury alone are the sole judges of the facts, not the Court.

*“Now, and this is most important, no part of these prior statements or of Shearer’s answers when questioned about the same in any way bind the defendant. They do not constitute any evidence against him. The said evidence was received only for the limited purpose that I have just described and such evidence is not to be considered in determining the guilt or innocence of the defendant. I make particular reference in this regard to the letter to the defendant, Exhibit 11 for Identification. The portions of and quotations from that letter that you have heard are not evidence against this defendant. In order for you to find the defendant guilty, you must be convinced of his guilt beyond a reasonable doubt*

from all of the other evidence in the case, *exclusive of any of the portions or quotations from the two prior written statements of the witness Shearer's answers when questioned about the same.*

“... You are to consider only the evidence in this case, but in your consideration of the evidence, you are not limited to the bald statements of the witnesses. On the contrary you are permitted to draw from facts which you find have been proved such reasonable inferences as seem justified in the light of your own experience.” (Emphasis added.)

The jury was further instructed (T. 268, 269) :

“The testimony of an informer, or any witness whose self-interest or attitude is shown to be such as might tend to prompt testimony unfavorable to the accused, should always be considered with caution and weighed with great care.

“A witness may be discredited or impeached by contradictory evidence or by evidence that at other times the witness has made statements which are inconsistent with the witness' present testimony, or by evidence that the general reputation of the witness for truth, honesty or integrity is bad.

“If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

“If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony

in other particulars and you may reject all the testimony of that witness, or give it such credibility as you may think it deserves.”

The trial court’s position on the question of the prior contradictory statements was clearly expressed out of the jury’s hearing (T. 72, 73):

“The Court: I think we have gone far enough on 11. I have no doubt but that the statement may be used in the manner that I used it. Our objective here is to bring out the truth and this witness is obviously reluctant and I allowed excerpts of Exhibit 11 to be read to the jury so the jury may, in determining his credibility as well as the credibility of other witnesses in this case, have in mind the fact, at least, in the letter stated that he would testify to the benefit of the defendant. . . .”

Appellant appears to take the position (Opening Brief, pp. 16, 17) that the Court’s Instruction A (T. 263-265) was insufficient to remove from the minds of the jurors things of a nature prejudicial to Appellant contained in Exhibits 10 and 11 for identification. In support of that position, Appellant cites (Opening Brief, p. 17) Judge Hand’s opinion in *United States v. Block*, 2nd Cir. 1937, 88 F.2d 618, 620.

Some 20 years after *United States v. Block*, supra, Judge Hand had occasion to again discuss the effect of a jury instruction, and prior contradictory statements were involved. In *United States v. Allied Stevedoring Corp.*, supra (241 F.2d at 933), it was stated:

“... It is not, however, necessary in the case at bar to hold that the earlier statements might have been so used, because in the ‘supplementary’

charge the judge made it abundantly clear that, except in the case of the defendants themselves, only the witnesses' testimony on the stand was to be taken as evidentiary. However unlikely it may be that this is a feat possible for most minds, when the contradictions have once come before them, it is not as difficult as that required by the more intricate bit of mental gymnastic involved in confining the use of a defendant's admissions when they concern other defendants as well as him. *Delli Paoli v. United States*, 77 S.Ct. 294. We should indeed welcome any efforts that help disentangle us from the archaisms that still impede our pursuit of truth."

In *Wheeler v. United States*, D.C. Cir. 1953, 211 F. 2d 19, cert. den. 347 U.S. 1019, 98 L.Ed. 1140, 74 S.Ct. 876, Judge Bazelon stated by way of a note in response to Appellant's contention that although a prior statement of a witness might have been admissible for impeachment purposes, the trial court erred in permitting the statement to be read in its entirety:

"This, it is said, is particularly true since the statement, highly harmful to appellant, was prepared by a policewoman and signed by the child without reading it at a time when she was too distraught to know what she was doing. Neither the circumstances of the signing nor the inflammatory nature of its contents provides a bar to admission for impeachment purposes only. Such matters are merely a part of the complex of circumstances which the jury may consider in determining the impeaching effect, if any, of the earlier statement upon the credibility of the testimony uttered from the stand."



Finally, it is submitted, there was substantial evidence in the form of Agent Salmi's testimony from which the jury could find beyond reasonable doubt that Appellant, Dale Mathis, was guilty of the offenses charged in the indictment.

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**2. THE DISTRICT COURT COMMITTED NO ERROR IN GIVING COURT'S INSTRUCTION A.**

Appellant has specified as error the Court's giving of its Instruction A. The Court did, over Appellant's objection, instruct the jury (T. 263-265) as indicated beginning with the fourth full paragraph on page 12, supra, and continuing through the fifth line on page 14, supra. The emphasis was placed on the fact Appellant was not to be bound by the answers of Shearer and that nothing mentioned in either of the exhibits for identification constituted evidence against the Appellant.

The instruction was, it was respectfully urged, clear in its terms and completely fair to the Appellant.

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**3. THE DISTRICT COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL OR IN THE ALTERNATIVE FOR A NEW TRIAL.**

In determining defendant's motions under Rule 29, Federal Rules of Criminal Procedure, the Court was entitled to examine the evidence in the light most favorable to the Government. *Glasser v. United States*, 315 U.S. 60, 86 L.Ed. 680, 62 S.Ct. 457 (1941).



It is respectfully urged that there was sufficient evidence before the jury in the form of the testimony of Agent Salmi and the other officers, together with the expert testimony identifying the contents of the vial and cigarette as marihuana, to enable the jury to find beyond a reasonable doubt that the defendant was guilty as charged.

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### CONCLUSION

Appellee, United States of America, submits that in conclusion, in view of the foregoing arguments and considering the entire record herein, there was no error committed by the trial court in a degree sufficient to result in reversal of the judgment herein or to result in the granting of a new trial for the Appellant.

Dated, Las Vegas, Nevada,  
October 7, 1965.

Respectfully submitted,

JOHN W. BONNER,  
United States Attorney,

ROBERT S. LINNELL,  
Assistant United States Attorney,

*Attorneys for Appellee.*

## CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT S. LINNELL,

Assistant United States Attorney,

*Attorney for Appellee.*

(Appendix Follows)



## **Appendix.**



## Appendix

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*United States v. Allied Stevedoring Corp.*, 241 F.2d 925, at 932, 933 states:

“... The error in all these instances is, stated generally, that the prosecution, having called the witnesses, was allowed to impeach them by showing that they had made contradictory statements, and that this was in effect to substitute the early statements in the jurors’ minds for their testimony at the trial. Historically, the doctrine that one may not ‘impeach’ a witness whom one has called rests upon the notion that the party who calls him vouches for his credibility—a notion apparently going back to the time when all trials were deemed in some degree to demand a divine sanction. A party depended upon the oaths of his witnesses, not because of rational inferences from what they said, but because ‘they were “oath-helpers” by whose mere oath, taken by the prescribed number of persons in the proper form, the issue of the cause was determined.’ As Judge Sanborn said in *London Guarantee & Accident Co. v. Woelfle*, 8 Cir., 83 F.2d 325, 332, the rule has ‘come to be more honored in its breach than in its observance,’ for we deem it now settled that the practice is permissible in the discretion of the judge. Contradictory statements may have a legitimate purpose even though in the words of Dean Wigmore, Sec. 1018(b), they ‘are not to be treated as having any substantial and independent testimonial value’; and taken by themselves they no doubt are not to be so recognized. They may, however, in fact revive the witness’s memory and satisfy him that he was right the first time, or, they may show him



the danger of persisting in testimony whose falsity is now detected, and in making him recant. In either event they have a proper function, now generally recognized, even though by itself they have no 'testimonial value.'

"But even when they produce neither result, logically at any rate there is at times no reason to deny their competency. It is one thing to put in a statement of a person not before the jury: that is indeed hearsay bare and unredeemed. But it is quite a different matter to use them when the witness is before the jury, as part of the evidence derived from him of what is the truth, for it may be highly probative to observe and mark the manner of his denial, which is as much a part of his conduct on the stand as the words he utters. Again and again in all sorts of situations we become satisfied, even without earlier contradiction, not only that a denial is false, but that the truth is the opposite: 'The landy doth protest too much, methinks.' This is not to rely upon the statement as a ground of inference, taken apart from the sum of all that appears in court; it is to allow the jury to use the whole congeries of all that they see and hear to tell where the truth lies. We and other courts have a number of times allowed this course to be taken. Indeed to deny this is to hold that nothing that comes from a witness on the stand can be used in support of the issue except his words under oath: the rest of his conduct may be used to refute what he asserts, but for nothing else. In short, out of the whole nexus of his conduct before the jury, they may treat those words alone as affirmatively relevant." (Footnotes omitted.)

No. 20,283

United States Court of Appeals

For the Ninth Circuit

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DALE MATHIS,

*Appellant,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

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APPELLANT'S OPENING BRIEF

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BABCOCK & SUTTON,

RAYMOND E. SUTTON,

Suite 105, Friedman Building,

300 Fremont Street,

Las Vegas, Nevada,

*Attorneys for Appellant.*

FILED

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FRANK H. SCHMID, CLERK



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# United States Court of Appeals

## For the Ninth Circuit

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DALE MATHIS,

vs.

UNITED STATES OF AMERICA,

*Appellant,*

*Appellee.*

### APPELLANT'S OPENING BRIEF

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#### JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the District of Nevada, adjudging the Appellant guilty as charged in both counts of a two count indictment following a jury trial.

The offenses occurred in the District of Nevada. The District Court has jurisdiction by virtue of Title 18, United States Code, Section 3231 and Title 21, United States Code, Section 176(a). Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

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#### STATEMENT OF PLEADINGS AND FACTS

The Appellant, on September 29, 1964, was charged by a two count indictment in the United States District Court for the District of Nevada with violating



Title 21, United States Code, Section 176(a) (R.7-8).<sup>1</sup> The Appellant was tried on the indictment before a jury on April 5, 8 and 9, 1965. The jury, on April 9, 1965, returned a verdict of guilty as to each count of the indictment. The Appellant, on May 24, 1965, was sentenced and judgment on the jury's verdict was entered (R.22). The Appellant's Notice of Appeal was filed on May 25, 1965 (R.23-24). Upon Appellant's Motion, the time for Docketing the Record on Appeal was enlarged to August 4, 1965 (R.3).

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### STATEMENT OF THE CASE

Detective Karl Albright, of the Clark County, Nevada Sheriff's Office, on July 9, 1964, introduced Harrison Allen Shearer to Federal Narcotic Agent Richard Salmi (R.T.74).<sup>2</sup> Agent Salmi was introduced to Shearer as a Narcotic Agent (R.T.98). Shearer, after the introduction, agreed to become an informer for Agent Salmi and to introduce Agent Salmi to dope peddlers in North Las Vegas, Nevada (R.T.99-100).

Informant Shearer, in the early morning of July 10, 1964 (R.T.76), approximately one hour after meeting Agent Salmi (R.T.98), drove with the Agent, in the Agent's car, to the Appellant's residence in North Las Vegas, Nevada. The Informant introduced Agent Salmi as Dickie to the Appellant. Agent Salmi

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<sup>1</sup>"R." refers to the Record, Volume I.

<sup>2</sup>"R.T." refers to the Reporter's Transcript.

afterwards discussed purchasing pound quantities of marihuana with the Appellant (R.T.76). This conversation took place in Agent Salmi's car, in front of the Appellant's residence (R.T.77). Then the Appellant, the Informant and the Agent, in Agent Salmi's car, drove away from the Appellant's house and after driving for a while, the Appellant directed Agent Salmi to a park in North Las Vegas, Nevada (R.T.78). The Appellant directed Agent Salmi to pull into a parking lot and to park the car. The group then left the car and walked into the park area (R.T.78). The group at this point was accosted by police officers, searched for weapons and questioned, but were not arrested (R.T.79-80). The police then left the area and the group proceeded on into the park. The Appellant and the Informant walked towards a shed and Agent Salmi followed. The Appellant and Agent Salmi entered the shed together and Agent Salmi observed the Appellant reach up to a rafter and remove a small vial (R.T.81, 103). The Appellant, followed by Agent Salmi, walked out of the shed and the Appellant then handed the vial to the Informant who had been standing outside the shed. The Informant placed the vial in his shirt pocket (R.T.59, 82, 104) and thereafter the three men left the park, returned to Agent Salmi's automobile and drove to the Bonanza Club. Agent Salmi parked his car at the Bonanza Club (R.T.82, 105) and locked the car (R.T.105). The three men then entered the Bonanza Club and seated themselves for refreshments. The Appellant and Agent Salmi proceeded to discuss the purchase and sale of large

quantities of marihuana (R.T.83). The group, at approximately 3:00 o'clock A.M. left the Bonanza Club, re-entered Agent Salmi's car and drove the Appellant to his residence (R.T.84), discharged the Appellant from the car and drove away (R.T.85). After Agent Salmi and the Informant left the Appellant's residence, the Informant removed the vial from his left shirt pocket and handed it to Agent Salmi (R.T.86). A few minutes later Informant Shearer left the car (R.T.87) and Agent Salmi returned to the Castaways Hotel (R.T.88). There Agent Salmi met Narcotic Agent Yanello (R.T.88, 139), and the plastic vial was at that time placed in a lock-seal envelope (R.T.109). The plastic vial and its contents were admitted into evidence as Exhibits 4 and 5 (R.T.126) and comprise Count I of the indictment (R.7).

The Appellant was arrested on the above charge at his residence in the early morning of September 17, 1964, by a number of officers from the Clark County Sheriff's Office, United States Marshal's Office and by Agent Salmi (R.T.149). After the Appellant was arrested and during his booking process at the County Jail, he was found to possess part of a marihuana cigarette (R.T.152). The partial cigarette was discovered by Detective Eugene Smith during his physical search of the Appellant and his clothes. The partial cigarette was admitted into evidence as Exhibit 9 and comprises Count II of the indictment (R.7).

The Appellant filed a Motion to Suppress as Evidence the marihuana alleged in the indictment (R.9-14), which Motion was denied by the Court (R.T.124).

The Motion to Suppress was supported by the Affidavit of Harrison Allen Shearer, the Government Informant (R.11-12). The Government, during the trial, called Shearer as a witness and was allowed to question him as a hostile witness (R.T.36). A statement, signed by the witness, was marked as Exhibit 10 for identification (R.T.34) and when showed to the witness was asserted to have been signed involuntarily (R.T.34). The witness was questioned concerning the truth or falsity of the statement (R.T.37-40). A letter the witness Shearer stated he wrote to the Appellant was marked as Exhibit 11 for identification and the Appellant, over objection, was questioned by Government counsel relative to the proposed Exhibit (R.T. 41-47). The Trial Judge also questioned the witness Shearer in the presence of the jury regarding Exhibits 10 and 11 for identification (R.T.68-73). Neither of the proposed Exhibits were admitted into evidence (R.T.155).

The Appellant moved for a Judgment of Acquittal at the conclusion of the Government's case (R.T.156) and again at the conclusion of all evidence (R.T.222). Both motions were denied by the Court (R.T.157, 222). The Appellant, after a verdict of guilty as to both counts of the indictment, filed a Motion for Judgment of Acquittal or in the Alternative a Motion for a New Trial (R.18-21). The Court, after oral argument, denied Appellant's Motion (R.T. M.J.A. 3-8).<sup>3</sup>

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<sup>3</sup>"R.T. M.J.A." refers to Reporter's Transcript, Motion for Judgment of Acquittal.

The Appellant was sentenced on May 24, 1965 and committed to the custody of the Attorney General for a period of seven (7) years for each count of the indictment, to run concurrently (R.22, 28-31). The Appellant filed his Notice of Appeal from the judgment on May 24, 1965 (R.23-24).

---

### **SPECIFICATIONS OF ERROR**

1. The Court's error in permitting the witness Shearer to be questioned, in the presence of the jury, concerning Exhibits 10 and 11 for identification.

2. The Trial Court's giving Court's Instruction A:

"Now, the witness, Harrison Shearer, or Allen Shearer, whatever his full name was, was examined by counsel and by the Court as to certain portions of or quotations from two prior written statements made by him. One statement marked Exhibit 10 for Identification, but not received in evidence, was a statement in the handwriting of Agent Salmi signed by the witness Shearer. The other statement, marked Exhibit 11 for Identification, also not received in evidence, was a letter written by the witness Shearer to the defendant.

Now, it appeared to the Court that some of the quoted portions of these two prior written statements were inconsistent with the testimony of the witness Shearer given before you.

The only purpose of so questioning witness Shearer and confronting him with portions of or quotations from his prior written statements while he was on the stand was to permit you to weigh



those portions and quotations of the prior statements and his answers when questioned about the same, together with his other testimony given before you, all for the purpose of assisting you in determining what credibility and weight you may wish to give to the testimony of the witness Shearer.

It is the exclusive province of the jury to disregard the Court's comment that there are inconsistencies between portions of the prior written statements and the defendant's testimony before you. The jury alone are the sole judges of the facts, not the Court.

Now, and this is most important, no part of these prior statements or of Shearer's answers when questioned about the same in any way bind the defendant. They do not constitute any evidence against him. The said evidence was received only for the limited purpose that I have just described and such evidence is not to be considered in determining the guilt or innocence of the defendant. I make particular reference in this regard to the letter to the defendant, Exhibit 11 for Identification. The portions of and quotations from that letter that you have heard are not evidence against this defendant. In order for you to find the defendant guilty, you must be convinced of his guilt beyond a reasonable doubt from all of the other evidence in the case, exclusive of any of the portions or quotations from the two prior written statements of the witness Shearer's answers when questioned about the same." (R.T. 263-265.)



The Appellant objected to Court's Instruction A on the ground the statements read to the witness were not in evidence and the Court's Instruction only amplified the importance of the statements to the jury (R.T.275).

3. The Trial Court's error in denying Appellant's Motion for Judgment of Acquittal or Appellant's Alternative Motion for a New Trial.

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### SUMMARY

The Appellant was indicted, tried, and convicted for possessing marihuana on two separate occasions. The Appellant takes the position that the evidence before the Court upon which the Appellant was convicted was insufficient as a matter of law to show that on either occasion the Appellant had possession and knowledge of the marihuana and that without proof of possession the evidence did not prove illegal importation of the marihuana as required by the charging statute.

That the paucity of the evidence touching on Appellant's possession of marihuana was strengthened by permitting the Government to question the witness Harrison Allen Shearer concerning proposed Exhibits 10 and 11, extrajudicial documents, which were not in evidence and from which the jury could infer Appellant's participation and guilt.

**ARGUMENT****I.****THE COURT'S ERROR IN PERMITTING THE WITNESS SHEARER TO BE QUESTIONED, IN THE PRESENCE OF THE JURY, CONCERNING EXHIBITS 10 AND 11 FOR IDENTIFICATION.**

The Appellant was indicted on September 29, 1964 for the offenses upon which this appeal is taken (R.7-8). The Appellant, on March 9, 1965, prior to his jury trial, filed a Motion to Suppress Evidence (R.9-10). The Motion was directed to the suppression of the marihuana alleged in the indictment. Thereafter, on April 2, 1965, the Appellant supplemented his Motion to Suppress by the Affidavit of Allen H. Shearer (R.11-13). This affidavit was filed on April 2, 1965 and served the same day on the United States Attorney for the District of Nevada (R.13).

The Appellant's jury was selected on April 5, 1965 and the trial took place on April 8 and 9, 1965 (R.9). The second witness called by the Government was Harrison Allen Shearer (R.T.31), who was the same person as Affiant Allen H. Shearer (R.11-13). The witness Shearer testified concerning his meeting with Narcotic Agent Salmi, his acquaintance with the Appellant, and introducing the two men to each other (R.T.31-34). During direct examination the witness Shearer was shown Plaintiff's Exhibit 10 for identification and asked if he recognized his signature on the bottom of the second page (R.T.34).

The witness acknowledged his signature, read the statement, but denied signing the statement voluntarily (R.T.35). He testified he had signed the statement

under threat of being returned to jail (R.T.35). At this point the Government requested the Court to declare the witness hostile and permit leading questions; which request was granted (R.T.36). Thereafter, the Government questioned the witness, using the question form "isn't it true" (R.T.36-40).

The Government specifically referred to Plaintiff's Exhibit 10 for identification and from the statement questioned the witness over objection, on the ground of impeaching one's own witness (R.T.40).

The Trial Judge, when the Government and the defense had completed examination of the witness, questioned the witness concerning the truth or falsity of his statement, proposed Exhibit 10. The Court read excerpts from the statement to the witness and asked if the portion read was true (R.T.68-72). Objection was made to this procedure by Appellant's counsel (R.T.72).

A letter, from the witness Shearer to the Appellant, was marked Exhibit 11 for identification (R.T.40-41). The letter referred to Appellant's other marihuana activities (R.T.42-44). The Trial Court permitted the Government to question the witness, over objection, by quoting from proposed Exhibit 11 (R.T.44-47). The entire proceedings touching on Exhibits 10 and 11 for identification, took place in the presence of the jury.

The rule against a party impeaching its own witness and exceptions to the rule were stated by this Circuit in *Meeks v. United States*, 179 F.2d 319 (9th Cir. 1950). This Court noted the rule does not apply

(1) where the prosecution in a criminal case is under a legal duty or obligation to call the witness, (2) where the witness has testified before the grand jury, and (3) where the Court compels the prosecution to call the witness. The witness Shearer, called by the Government, does not fit the three classifications. Nonetheless, Shearer's credibility was placed in issue by the Government's use of proposed Exhibit 10 and resulted in his impeachment in the eyes of the jury. The Government's use of proposed Exhibit 10 to destroy the probative effect of Shearer's testimony was proper only if the Government was surprised by his testimony. *Fong Lum Kwai v. United States*, 49 F.2d 19, 20 (9th Cir. 1931).

The Government never vocally asserted surprise at Shearer's testimony. The witness Shearer was asked, immediately prior to marking Plaintiff's Exhibit 10 for identification, the following:

"Q. (Mr. Linnell) What happened at Fantasy Park?

A. (Witness Shearer) Nothing that I know of." (R.T.34).

The Government counsel then marked the witness' statement as Exhibit 10 for identification, showed it to the witness for his examination and questioned him concerning it:

"Q. (Mr. Linnell) Did you sign it voluntarily?

A. (Witness Shearer) More or less.

Q. (Mr. Linnell) What do you mean by 'more or less'?

A. (Witness Shearer) Really wasn't voluntarily.

Q. (Mr. Linnell) Why wasn't it voluntarily?

A. (Witness Shearer) Because I was told if I didn't I would be put back in jail.

Q. (Mr. Linnell) By whom?

A. (Witness Shearer) By Richard Salmi.

Q. (Mr. Linnell) Where was this?

A. (Witness Shearer) In the Castaways Hotel.

Q. (Mr. Linnell) Castaways?

A. (Witness Shearer) Yes." (R.T.35).

The Government at this point requested the witness to be declared hostile and leading questions permitted, which request the Court granted (R.T.36). We must assume the Trial Court merely found the witness recalcitrant for the record is devoid a factual surprise nor was surprise asserted by the Government.

Counsel's assurance to the Court that surprise exists is sufficient. *United States v. Graham*, 102 F.2d 436, 442 (2nd Cir. 1939). But, the surprise must be genuine to the party calling the witness. *Gendelman v. United States*, 191 F.2d 993, 996 (9th Cir. 1951). The witness must be called in good faith, and surprise shown before leading questions by cross-examination is permitted. *Banks v. United States*, 204 F.2d 666 (8th Cir. 1953).

Surprise at Shearer's testimony did not exist. The Government had been served with Shearer's Affidavit (R.11-13) prior to trial. Shearer's testimony should have been anticipated by the calling party. "One who



calls a witness and anticipates adverse testimony cannot plead surprise and treat him as adverse. . . ." *United States v. Biener*, 52 F.Supp. 54 (U.S.D.C. E.D.Penna. 1943). The witness Shearer, with his statement, proposed Exhibit 10, in front of him on the witness stand was questioned at length by the Government (R.T.36-40). Most damaging and prejudicial to the Appellant were the questions pertaining to Appellant's runner bringing in marihuana and the simultaneous reference by the prosecutor to Exhibit 10 for identification (R.T.39-40).

The prosecution, prior to trial, having been served with Shearer's Affidavit (R.11-13) was under a duty to make inquiry what Shearer's testimony would be. The inquiry rule was announced by this Circuit in *Sullivan v. United States*, 28 F.2d 147 (9th Cir. 1928), the Court at page 149 stated: "In any event a party cannot claim to be surprised by the testimony of a witness, when he has failed to make inquiry as to what the testimony will be before calling the witness to the stand. . . ." The inquiry rule was relaxed by this Circuit in *Stevens v. United States*, 256 F.2d 619 (9th Cir. 1958), but only if the Government can reasonably rely on the prior statement as the truth and to which the witness will testify.

Retrospectively, the prosecution's use of Exhibit 10 for identification had a twofold purpose. Either to neutralize the effect of Shearer's testimony or to get into evidence before the jury Shearer's ex parte statement.



The use of the statement to neutralize Shearer's testimony, presupposes injury to the Government's cause. Clearly, Shearer's testimony through the marking of Exhibit 10 for identification (R.T.34) was not injurious to the Government's case. The Government's use of proposed Exhibit 10 was error and exceeded the range of the rule in *Kuhn v. United States*, 24 F.2d 910 (9th Cir. 1928) where this Court said at page 913, "The maximum legitimate effect of the impeaching testimony can never be more than the cancellation of the adverse answer by which the party is surprised. . . ." Accord, *Culwell v. United States*, 194 F.2d 808 (5th Cir. 1952).

The alternate use of the statement before the jury under the guise of impeachment was error and prejudicial. *Young v. United States*, 97 F.2d 200 (5th Cir. 1938), *Kuhn v. United States*, supra.

The United States Court of Appeals for the Fifth Circuit in *Young v. United States*, supra, cited *Kuhn v. United States*, supra, and gave its approbation to the procedure of withdrawing a witness and striking the witness' testimony, when the witness testifies adversely to the proponent's cause.

The jury's attention was further focused on proposed Exhibit 10, when the witness Shearer was questioned by the Trial Court on the truth or falsity of portions of the statement that the Court read to the witness (R.T.68-72). The action of the trial falls within the ambit of *Kuhn v. United States*, supra, and the procedural prohibition therein pronounced.

The prosecution marked as Exhibit 11 for identification, a letter from the witness Shearer to the Appellant (R.T.40). The letter was in Shearer's handwriting and so identified by the witness (R.T.41). The letter by Shearer's testimony was mailed to the Appellant by certified mail (R.T.42). The Court allowed the prosecution in examining the witness to quote from the letter. Appellant objected to the procedure (R.T.44). The letter was a fugitive document. There was no evidence the letter was ever received by the Appellant. The Government further did not lay a foundation and bring into play, the rebuttal presumption of the letter's receipt by the Appellant. *Hagner v. United States*, 285 U.S. 427, 52 S.Ct. 417 (1931).

If the purpose of the letter was to neutralize the witness' testimony, it exceeded the purpose, *Kuhn v. United States*, supra, and referred to other narcotic activity of the Appellant (R.T.42-47), plus the self-assertion of the witness that he could harm the Appellant in Court (R.T.47).

The contents of proposed Exhibits 10 and 11, inadmissible hearsay evidence, were brought before the jury under the artifice of impeachment. *Young v. United States*, supra. Cf. *Bateman v. United States*, 212 F.2d 61 (9th Cir. 1954). The jury not only saw proposed Exhibits 10 and 11, but the entire reading of the proposed exhibits took place in the presence of the jury. The resulting testimony related to hearsay matters, inadmissible as substantive evidence. *Feutralle v. United States*, 209 F.2d 159 (5th Cir. 1954).

But Cf, *Bieber v. United States*, 276 F.2d 709 (9th Cir. 1960). The Fifth Circuit in *Young v. United States*, supra, reversed a conviction on the ground that ex parte statements and a letter were improperly admitted into evidence against the defendant.

The Trial Court by Instruction A (R.T.263-265) instructed the jury concerning the purpose for which they were to consider Exhibits 10 and 11 for identification. That the questions relating to the proposed exhibits were for the purpose of assistance in determining the credibility of the witness Shearer.

The proposed Exhibits 10 and 11 were not admissible as substantive evidence, *Bridges v. Wixon*, 326 U.S. 139, 65 S.Ct. 1443 (1945), *United States v. Barnes*, 319 F.2d 291 (6th Cir. 1963), and were not in fact admitted into evidence (R.T.155).

The Court instructed the jury regarding Shearer's credibility (R.T.263-265). "... (T)hat the legal distinction between credibility and to establish the stated fact, 'is a fine one for the lay mind to draw.' . . ." *Slade v. United States*, 267 F.2d 834, 839 (5th Cir. 1959). Therein the danger lies. Were the Appellant's jurors able to draw the line between Shearer's credibility and the stated fact of his testimony concerning proposed Exhibits 10 and 11. The Court's Instruction A (R.T.263-265) left the jurors to disentangle the stated fact.

The Second Circuit Court of Appeals in *United States v. Block*, 88 F.2d 618 (2nd Cir. 1937) consid-

ered a factually similar case and said in the opinion by L. Hand, Circuit Judge, at page 620:

“The judge’s charge mended nothing; he left the jury to disentangle in their minds the innocuous part which the witness had conceded, from the great bulk which he had disaffirmed. The hearsay remained as effective as before, and really the prejudice was incurable anyway, whatever he might have said. . . .”

The manner in which proposed Exhibits 10 and 11 were used during the trial, was, it is submitted, prejudicial to the Appellant and reversible error.

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## II.

### **THE TRIAL COURT’S ERROR IN DENYING APPELLANT’S MOTION FOR JUDGMENT OF ACQUITTAL OR APPELLANT’S ALTERNATIVE MOTION FOR A NEW TRIAL.**

The Appellant, at the conclusion of the Government’s case in chief, moved for a Judgment of Acquittal on the ground the prosecution had failed to show the Appellant possessed the marihuana alleged in Count I of the indictment. The Court denied the motion (R.T.156). The Appellant, at the conclusion of all evidence, again moved for a Judgment of Acquittal as to both counts of the indictment on the ground the Government had failed to prove Appellant’s possession of the marihuana (R.T.156).

The Court, in considering both motions, was required by *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1941), to view the facts in the light most favorable to the Government.

The evidence most favorable to the Government showed that H. A. Shearer, during the early evening of July 10, 1964, placed a plastic vial on a rafter in a play house at Fantasy Park, North Las Vegas, Nevada (R.T. 51-52). The plastic vial contained catnip. The catnip had been placed in the plastic vial by Shearer for delivery to Narcotic Agent Salmi on the representation the vial contained marihuana (R.T. 52, 54).

After introductions, the Appellant, Shearer and Agent Salmi went to Fantasy Park. The Appellant's delivery of the vial to Shearer was the only evidence offered by the Government showing Appellant's possession of the marihuana alleged in Count I of the indictment (R.T.7-8; R.T.58, 104). The Appellant reached up on the rafters in the play house, took the vial and handed it to Shearer (R.T.81, 103). Thereafter, Shearer retained possession of the vial. The Appellant denied going to the play house and obtaining a vial from the rafters (R.T.203). Shearer testified that he left the vial on the seat in Agent Salmi's car when the three men were in the Bonanza Club (R.T. 59-60). The Informant Shearer delivered the vial to Agent Salmi, out of the Appellant's presence (R.T.83-93-106). There was no conversation between the Appellant and Shearer concerning the vial, nor was money exchanged.

The Ninth Circuit in an early case, *Mulaney v United States*, 82 F.2d 638 (9th Cir. 1936), held possession sufficient to support the inference of guilt meant having the narcotic drug in one's control or



under one's dominion. The record is clear that the Appellant did not have control or dominion of the marihuana contained in the vial. Control and dominion was at all times in the Informant Shearer. Actual or constructive possession of the vial of marihuana could not be honestly, fairly and conscientiously inferred and the conviction should not stand. *Hernandez v. United States*, 300 F.2d 114 (9th Cir. 1962). The facts might establish a willingness on Appellant's part to assist Shearer in overcoming the threat of prosecution (R.T.49), but the facts do not establish beyond a reasonable doubt possession of the marihuana. The vial was where Shearer said it would be (R.T.55) and the Appellant merely delivered the vial, not to Agent Salmi, but to Shearer. The proof of Appellant's possession was as meager as the proof of possession in *Williams v. United States*, 290 F.2d 451 (9th Cir. 1961) which was reversed.

The possession of a narcotic must be a knowing or knowledgeable possession. That is, the possessor must know that what he possesses is a narcotic. Unless there is knowing possession the proof fails and acquittal must follow. *Guevara v. United States*, 242 F.2d 745 (5th Cir. 1957). The uncontroverted facts show Appellant believed the vial to contain catnip (R.T.54-55). There was no other evidence before the Court to refute this knowledge or belief.

Count II of the indictment charges Appellant with possession of a portion of a marihuana cigarette (R.T. 7-8). The evidence most favorable to the Government, *Glasser v. United States*, *supra*, shows the cigarette



was found in Appellant's right levi trouser pocket by Detective Smith during Appellant's booking procedure on September 17, 1964 (R.T.446).

The Appellant had taken off his levis and handed them to Detective Smith, who searched the levis and found the cigarette (R.T.148). The presence of the cigarette was denied by the Appellant (R.T.200-201). The Appellant was indicted on September 29, 1964 (R.T.1-8). Count II of the indictment charges Appellant with possession of the marihuana cigarette on September 17, 1964.

The chemical analysis of the cigarette, Exhibit 9 (R.T.155) was made by Government Chemist Muron on September 25, 1964 (R.T.24) and the cigarette was determined to be marihuana (R.T.24). The chemist's report setting forth Chemist Muron's findings was not received by the Bureau of Narcotics in Los Angeles, California, until October 12, 1964, subsequent to the grand jury proceedings and Appellant's indictment.

The Appellant objected to the admission into evidence of Exhibit 9 on the ground there was no competent evidence before the Grand Jury of the cigarette's marihuana content. (R.T.154-155).

The rule is legion that an indictment is presumed to be founded on competent evidence. *United States v. Johnson*, 319 U.S. 503, 63 S.Ct. 1233, 87 L.Ed. 1546 (1943). The burden is upon the Appellant to overcome the presumption and is addressed to the sound discretion of the Court, *Sutton v. United States*, 79 F.2d 863 (9th Cir. 1935). The evidence showed that Exhibit

9 was found by Detective Smith (R.T.146); that he thought it was a marihuana cigarette, but did not analyze it, and gave the cigarette to a narcotic agent (R.T.153). That Narcotic Agent Windham took the cigarette, sealed it in an envelope and mailed it to the chemist on September 21, 1964 (R.T.130). That Exhibit 9 was tested by the chemist on September 25, 1964 (R.T.23) and the report of the test received by the Narcotic Bureau on October 12, 1964 (R.T.133).

The Appellant sustained his burden of proof and showed the grand jury did not have competent evidence upon which to return Count II of the indictment.

---

### CONCLUSION

The Trial Court erred as set forth in Appellant's specifications of error and the judgment, accordingly, should be reversed and remanded for a new trial.

Dated, Las Vegas, Nevada,  
August 28, 1965.

Respectfully submitted,

BABCOCK & SUTTON,

By RAYMOND E. SUTTON,

*Attorneys for Appellant.*

### CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

RAYMOND E. SUTTON,

*Attorney for Appellant.*

**United States**  
**Court of Appeals**  
**for the Ninth Circuit**

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MURPHY LOGGING CO., successor by merger to  
Murphy Timber Co.; HARRY C. MURPHY and  
DOROTHY SHEA MURPHY; EDWARD J.  
MURPHY and VIRGINIA C. MURPHY; PETER  
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*Appellants*

v.

UNITED STATES OF AMERICA,  
*Appellee*

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*On Appeal From the Judgment of the United States  
District Court for the District of Oregon*

---

**BRIEF FOR THE APPELLEE**

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RICHARD M. ROBERTS,  
ACTING ASSISTANT ATTORNEY GENERAL.

LEE A. JACKSON,  
DAVID O. WALTER,  
RICHARD J. HEIMAN,

*Attorneys, DEPT. OF JUSTICE,  
WASHINGTON, D. C. 20530.*

OF COUNSEL:

SIDNEY I. LEZAK,  
UNITED STATES ATTORNEY.

FILED

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WILLIAM T. WILSON, Clerk



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---

**BRIEF FOR THE APPELLEE**

---

**OPINION BELOW**

The opinion of the District Court (I-R. 13-19)<sup>1</sup> is  
officially reported at 239 F. Supp. 794.

**JURISDICTION**

This appeal involves federal income taxes for the  
calendar years 1959 and 1960 with respect to Harry,

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<sup>1</sup>"I-R." and "II-R." references are to Volume I and Volume  
II, respectively, of the record on appeal.



Edward and Peter Murphy and their wives,<sup>2</sup> and for the fiscal years ended February 29, 1960, and February 28, 1961, with respect to the corporate taxpayer. (I-R. 7-8). The taxes in dispute were paid on May 17, 1963. (I-R. 6.) Claims for refund were filed June 13, 1963 (I-R. 7-8), and were rejected on October 8, 1963 (I-R. 8). Within the time provided in Section 6532 of the Internal Revenue Code of 1954, on November 14, 1963, the taxpayers brought this action in the District Court for recovery of the taxes paid. (I-R. 27.) Jurisdiction was conferred on the District Court by 28. S.C., Section 1346. The judgment of the District Court was entered on May 17, 1965. (I-R. 20.) Within sixty days thereafter, on June 22, 1965, a notice of appeal was filed. (I-R. 21). Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

### QUESTIONS PRESENTED

1. Whether the District Court erred in holding that the transfer of machinery and equipment to the newly-formed taxpayer corporation was part of the tax-free formation of the corporation under Section 351 of the Internal Revenue Code of 1954 rather than an independent sale.

---

<sup>2</sup>The wives are parties to this action only because joint returns were filed for the years involved. (I-R. 15.)

2. Whether the District Court erred in holding that a bank loan of \$240,000 purportedly made to the corporate taxpayer was in substance and reality a loan to Harry, Edward and Peter Murphy as individuals.

### STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the statutes and Regulations are set out in Appendix A, *infra*.

### STATEMENT

The facts as found by the District Court (I-R. 13-15) are as follows:

For some years prior to February 2, 1959, three brothers — Harry, Edward and Peter Murphy — operated the Murphy Logging Company as partners. Each received a salary of \$25,000 per year, and profits, if any, were distributable in the same proportions as their interests, namely, Harry 53 1/3 per cent, Edward 33 1/3 per cent, and Peter 13 1/3 per cent. (I-R. 13.)

On February 2, 1959, the Murphy brothers organized the Murphy Timber Company, an Oregon corporation. This corporation was capitalized at \$1,500, and each of the Murphy brothers agreed to purchase \$500 in stock. (I-R. 13).

On March 1, 1959, the Murphy partnership agreed to sell, and at the same time delivered, some of its logging equipment which was carried on the books at \$28,414.10 to the new corporation at a price to be determined at a later date by an independent appraiser. On the same day, the Murphy corporation entered into two standard form written contracts to log and to construct roads for the Crown-Zellerbach Corporation. Shortly thereafter, it undertook to perform such contracts. (I-R. 14).

On April 6, 1959, each of the Murphy brothers paid the corporation \$500 for his stock. One week later, the corporation borrowed \$25,000 from the First National Bank of Oregon to carry on its operations, and between May 4 and July 30 the corporation borrowed additional sums totalling \$50,000 for the same purpose from the bank. (I-R. 14.)

In September, an independent appraiser fixed the value of the equipment transferred to the corporation at \$238,150. On December 31, 1959, the corporation borrowed a total of \$240,000 from the bank, and on the same day the corporation paid \$238,150 to the partnership. All of the bank loans were guaranteed by the brothers individually. (I-R. 14.)

In the partnership tax return for the calendar year 1959, the partners reported a long-term capital gain of \$209,735 on the sale of this equipment, and each of the partners filed a return and paid a tax on his distributive share of the gain. (I-R. 14.) The Commissioner of Internal Revenue disallowed the claimed depreciation and interest deductions taken by the corporation and asserted deficiencies both against the corporation and the Murphy brothers individually. (I-R. 14-15.) The District Court held that the real substance of the pertinent transactions was a capital contribution of equipment to the corporation and a loan by the bank to the brothers as individuals as contended by the Government. (I-R. 19.) Because the individual partners had reported their gain on the transfer of the equipment and had paid tax on this gain (I-R. 6), the District Court ordered refunds to them (I-R. 20). Both the corporation and the individuals have appealed.

### SUMMARY OF ARGUMENT

The District Court held that depreciable property transferred in March, 1959, to the corporate taxpayer as one of the steps in its formation was a contribution to its capital and that a bank loan formally made to the corporation in December, 1959, was in reality a

loan to its shareholders as individuals. This means that the corporation's deduction for depreciation is reduced and that corporate payments to the bank on the loan are dividends to the shareholders (who are themselves entitled to the interest deduction).

Under Section 351 of the 1954 Code no gain is to be recognized by a controlling transferor on the transfer of property for his equity interest in a corporation, and the basis of the property for depreciation remains the same as it was to the transferor. Taxpayers argue that the transfer here should be treated as a sale independent of Section 351, but the transfer was clearly a part of the transaction of incorporation, to be considered under that section. Indeed, the new corporation was formed for the very purpose of taking over the property in question. Unless the equipment is treated as part of the equity capital, the new corporation was undercapitalized from the outset.

Of essential importance to the District Court's holding is its consideration of the bank loan of \$240,000 which was formally made to the corporate taxpayer. This loan was negotiated on the guarantee of the three Murphy brothers as individuals, and the funds immediately went to their partnership in purported payment for the depreciable property. The District Court, on

the basis of all the evidence in this case, concluded that the loan was in fact to the Murphys on their credit and that the corporation was merely a conduit for the funds from the bank to them. This is a factual determination and is clearly warranted on this record.

## ARGUMENT

### I

#### **THE TRANSFER OF MACHINERY AND EQUIPMENT TO THE NEWLY-FORMED CORPORATE TAXPAYER BY ITS PREDECESSOR PARTNERSHIP WAS PART OF THE TAX-FREE FORMATION OF THE CORPORATION UNDER SECTION 351 OF THE INTERNAL REVENUE CODE OF 1954 RATHER THAN AN INDEPENDENT SALE.**

This case involves an adjustment reducing the corporate taxpayer's depreciation deduction and a separate adjustment disallowing an interest deduction claimed by the corporate taxpayer.<sup>8</sup> With respect to the depreciation issue, the taxpayers attempt to demonstrate that the property involved was the subject of a separate transaction of sale to the corporation rather than an essential ingred-

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<sup>8</sup>The District Court held that the indebtedness involved here was in fact the obligation of the corporation's shareholders (Harry, Edward and Peter Murphy, the individual taxpayers who are parties to this suit) and that payments made by the corporation as interest and principal on the indebtedness are constructive dividends to them. Of course, the Murphys are entitled to the interest deduction.



ient in its tax-free formation (with a carryover of the low basis of the transferor). As for the interest adjustment, the taxpayers argue that the District Court erred in considering a bank loan as in reality a loan to the Murphys as individuals. Resolution of the depreciation issue is not decisive of the interest question. See *Campbell v. Carter Foundation Production Co.*, 322 F. 2d 827 (C.A. 5th). Cf *Gooding Amusement Co. v. Commissioner*, 236 F. 2d 159 (C.A. 6th), certiorari denied, 352 U.S. 1031. Nevertheless, the bank arrangement is an important factor in the consideration of the Section 351 (Appendix A, *infra*) incorporation transaction and the question whether the property transferred to the corporation retains the basis of the transferor. In this first part of our brief we will discuss the incorporation transaction and the legal principles involved in light of all the facts. In the last part of the brief we will focus on the loan arrangement.<sup>4</sup>

Under the general rule of Section 1002 of the Internal Revenue Code of 1954 (Appendix A, *infra*), the entire amount of gain or loss from the sale or exchange of property is to be recognized. An exception to this general rule is contained in Section 351 of the 1954 Code (Appendix A, *infra*) to assist business re-

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<sup>4</sup>Significant portions of the evidence are based on the oral testimony of the witnesses.

adjustments. See S. Rep. No. 275, 67th Cong., 1st Sess., pp. 11-12 (1939-1 Cum. Bull. (Part 2) 181, 188-189). The basic premise of Section 351 is that transfers of appreciated or depreciated property to a newly-formed corporation that is controlled by the transferors work a change of form only, which is not the proper occasion for reckoning gain or loss on the transferred property. See *Helvering v. Cement Investors*, 316 U.S. 527; *Portland Oil Co. v. Commissioner*, 109 F. 2d 479, 488 (C.A. 1st); *Mather & Co. v. Commissioner*, 171 F. 2d 864 (C.A. 3d), certiorari denied, 377 U.S. 907.

Section 351 provides that no gain or loss is to be recognized if property is transferred to a corporation by one or more persons in exchange for that corporation's stock or securities, and the transferors own at least 80 per cent of the stock after the transfer. As a corollary to the postponement of the tax on incorporation, under Section 362(a) of the 1954 code (Appendix A, *infra*), the transferee corporation's basis in the property for depreciation is the same as it would be in the hands of the transferor, increased or decreased in the amount of gain or loss recognized to the transferor upon the transfer.

In the instant case the corporate taxpayer was organized on February 2, 1959, for the express purpose of

taking over certain operating equipment owned by the Murphy Brothers' partnership.<sup>6</sup> (I-R. 13; II-R. 9.) The equipment was transferred to the corporation in March and was used to carry out a logging contract and a road construction contract which were entered into with Crown-Zellerbach at about the same time as the transfer. (I-R. 2-3). Thereafter, each of the Murphys paid the corporation \$500 for his one third stock interest for a total of \$1,500 paid-in capital, and up to July 30 the corporation borrowed \$75,000 from the First National Bank of Oregon in order to carry on its operations. (I-R. 14.) In September, an independent appraiser valued the equipment transferred to the corporation at \$238,150, and on December 31, 1959, the corporation borrowed \$240,000 from the First National Bank of Oregon and transferred \$238,150 of this to the Murphy brothers' partnership in settlement of its agreement to buy the logging equipment for the appraised value. (I-R. 314.)

It is the Government's position that the transfer of the logging equipment, which taxpayers wish to treat as an independent sale, is in fact an essential part of the Section 351 exchange transaction in which the corporate taxpayer was formed. The Murphys erred in re-

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<sup>6</sup>The equipment was carried on the partnership's books at \$28,414.10. (I-R. 14.)

porting gain on this transfer because the property was exchanged for an equity interest in the new corporation, and the partnership's basis in the assets is carried over as the basis to the corporation pursuant to Section 362(a).

In determining whether the transfer of the operating assets was a sale independent of the tax-free formation of the corporation or is to be treated as part of the equity investment, an important consideration is the excessive disproportion between the corporation's nominal stock investment and its debt structure — the "thin capitalization." This factor has been important in the traditional situation involving debts owed by a corporation to its shareholders since the case of *John Kelley Co. v. Commissioner*, 326 U.S. 521, wherein the Supreme Court made the following observation (p. 530):

As material amounts of capital were invested in stock, we need not consider the effect of extreme situations such as nominal stock investments and an obviously excessive debt structure.

Following the *Kelley* case the Tax Court and other courts placed great reliance on the ratio between debt and equity in deciding whether so-called "debt" in fact represented an equity investment, although no clear pattern was present. See Caplin, *The Caloric Count of a Thin Incorporation*, Seventeenth Annual N.Y.U. In-

stitute on Federal Taxation, pp. 771, 779-784 (1959). However, in *Gooding Amusement Co. v. Commissioner*, 23 T.C. 408, affirmed, 236 F. 2d 159 (C.A. 6th), certiorari denied, 352 U.S. 1031, the Tax Court ceased to rely primarily on the ratio test but used the subjective test of the "intent" to create a true debt relationship between shareholders and corporation. This Court has accorded great weight to the "intention" of the parties in the determination of whether purported debt is to be treated as an equity investment. *Taft v. Commissioner*, 314 F. 2d 620, 623, footnote 1; *Miller's Estate v. Commissioner*, 239 F. 2d 729, 734; *Wilshire & West. Sandwiches v. Commissioner*, 175 F. 2d 718, 720; *Maloney v. Spencer*, 172 F. 2d 638, 641; *Commissioner v. Proctor Shop*, 82 F. 2d 792, 794 (all cited by taxpayers, Br. 10, 21-22, 24, 28). Nevertheless, in *O. H. Kruse Grain & Milling v. Commissioner*, 279 F. 2d 123, 125-126, and *Wilbur Security Co. v. Commissioner*, 279 F. 2d 657, 662, this Court held that there are a variety of factors to be considered in determining whether amounts advanced to a corporation constitute debt or equity. Intent of the parties is one of these factors, and so is thin capitalization. See also, *Root v. Commissioner*, 220 F. 2d 240, 241 (C.A. 9th).

It is the Government's position that it would be unrealistic to apply the various factors set out in *Kruse*

and *Wilbur Security* without regard to the substance of the method by which the corporate taxpayer was supplied with risk capital. We will discuss in detail the District Court's holding (I-R. 19) that the \$240,000 in borrowed funds were in fact loaned by the bank to the Murphy Brothers as individuals and that the transfer of the equipment represented a capital contribution to the corporate taxpayer. But even if the borrowed funds had in fact been utilized by the corporation to purchase assets from outsiders rather than going directly to the Murphys,<sup>9</sup> reason demands that this obvious device not be permitted to hide the ultimate reality of the transaction. As stated in Moore and Sorlien, *Adventures in Subchapter S* and Section 1244, 14 Tax L. Rev. 453, 493, footnote 108 (1959):

It is possible that the reason for the paucity of authority on this point is the difficulty of focusing the attack. Nearly always a thin capitalization is placed under fire by denying the corporate deduction for interest paid the shareholder-noteholder. Sometimes the attack is on payment of the capital, which could be treated as a dividend or equity redemption substantially equivalent to a dividend. If a bank is the creditor, an additional step must be taken by the Commissioner, as the corporation will point out that the interest has been paid to a bank and ask how in the world the Commissioner

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<sup>9</sup>Such a case would be stronger for the taxpayers than the instant case where the very reason for forming the corporation was to operate the transferred equipment in corporate form. (II-R. 9.)



can deny *that* deduction. The answer would have to be that the shareholder, by endorsing the note, has placed himself in a dual position — creditor of the corporation and debtor to the bank. In effect, then, the interest is paid to the shareholder, who in turn pays it to the bank. If the capitalization were thin, the analysis would be that the “interest” paid by the corporation was a dividend to the shareholder, who receives an equivalent deduction for interest paid the bank. Thus, the bank pays tax on the interest, the shareholder is even, and the corporation loses its interest deduction. Lest this reasoning be thought too strained, the Supreme Court dictum in the *Putnam* case (352 U.S. 82 (1956)), appears to support the conclusion and places in some jeopardy what had been thought by many to be a fairly simple escape-hatch to the thin capitalization doctrine.

Bittker, *Federal Income Taxation of Corporations and Shareholders* (Student ed., 1964) makes the point as follows (p. 124, Footnote 8):

When a corporation borrows funds on notes endorsed by its shareholders, the expectation of the parties is that the corporation will be successful enough to pay off the borrowed funds itself. But this is equally true when the shareholders make “loans” directly to a thin corporation; the intent to have the corporation pay off the “loans” is, in such instances, regarded as no more than an intent to have the corporation pay dividends. So with guaranteed loans. An intention to repay them out of corporate profits does not make them “loans” by the bank to the corporation. They can — in appropriate circumstances — be regarded as loans by the bank to the shareholders, the proceeds of which are used by the shareholders to make capital contributions to the corporation; the

intention to apply corporate profits to their repayment can be regarded as no more than an intention to pay disguised dividends when, as, and if the corporation's financial condition permits.

Other authorities agree. See Weyher and Weithorn, *Capital Structure of New Corporations*, Sixteenth Annual N.Y.U. Institute on Federal Taxation, pp. 227, 292 (1958); Holzman, *The Current Trend in Guaranty Cases: An Impetus to Thin Incorporation?*, 21 *Tax L. Rev.* 29, 47-48 (1955). See also, Bittker, *Thin Capitalization: Some Current Questions*, 34 *Taxes* 830, 834-835 (1956).

The analysis in the cited articles presupposes a thinly-capitalized corporation. Certainly the corporate taxpayer was thinly capitalized when, in considering only its debt with respect to the logging equipment, the debt to equity ratio was 159 to 1 (\$238,150 divided by \$1,500). In addition, the corporation borrowed additional sums totalling \$75,000 from the First National Bank of Oregon to finance its initial operations (I-R. 14.)

Taxpayers argue that the paid-in capital of the corporation should be considered together with two contracts which were entered into with the Crown-Zellerbach Corporation. (Br. 10-16.) The District Court fully and fairly answered this contention (I-R. 17-18):

There was no evidence as to the value of the two Crown-Zellerbach contracts or that these contracts had ever been appraised. Likewise, there was no evidence that the Murphy brothers, either before or after the corporation was organized, received any advantage from Crown-Zellerbach either in rates or terms over any of their competitors in this highly competitive field. There are too many bankruptcy reviews, Miller Act and breach of contract cases, and actions on bonds involving logging and road construction jobs which come into this Court, primarily because of inadequate capitalization, to place any reliance in counsel's argument that \$1,500 plus two Crown-Zellerbach contracts furnished adequate capitalization for a new corporation undertaking two large logging and road construction jobs. Logging and road construction contracts are hazardous even for the most expert operators. The amount of rain that one encounters, or the amount of rock that one finds, both of which are often unforeseeable, will determine whether a contract is a bonanza or a disaster.

Taxpayers also argue that not much initial capitalization is needed in the logging business. (Br. 16-18.) This contention is refuted, however, by the fact that another logging corporation held by the Murphys was required to have an initial capitalization of \$100,000. (II-R. 18.) On this appeal, the taxpayers contend that the capitalization of the new corporation should include an intangible going-concern value. (Br. 12-14.) What this value might be is left to speculation. In the event that the two Crown-Zellerbach contracts had proved

unprofitable, the corporate taxpayer which was capitalized at \$1,500 would have been seriously insolvent without further infusions of new capital. Thus, without the successful conclusion to the operations for Crown-Zellerbach, the sole activity of the corporation (II-R. 9.), any value as a going concern would seem to be minimal.

The District Court noted that the assets "sold" to the corporate taxpayer by its organizers were essential for it to carry on its operations. (I-R. 16-17.) Taxpayers argue that this fact is unimportant. (Br. 19-22.) But many courts consider that it is a relevant factor in determining whether a transfer to a newly-formed corporation in substance represents an equity investment. See *Schnitzer v. Commissioner*, 13 T.C. 43, 61, affirmed *per curiam*, 183 F. 2d 70 (C.A. 9th), certiorari denied, 340 U.S. 911; *McSorley's, Inc. v. United States*, 323 F. 2d 900, 902 (C.A. 10th); *Charter Wire, Inc. v. United States*, 309 F. 2d 878, 880 (C.A. 7th), certiorari denied, 372 U.S. 965; *Rowan v. United States*, 219 F. 2d 51, 55 (C.A. 5th); *Brake & Electric Sales Corp. v. United States*, 287 F. 2d 426, 428, (C.A. 1st); *Dobkin v. Commissioner*, 15 T.C. 31, 33, affirmed *per curiam*, 192 F. 2d 392 (C.A. 2d); *Burr Oaks Corp.*

*v. Commissioner*, 43 T.C. 635, 647 (taxpayer's appeal pending in the Court of Appeals for the Seventh Circuit). See also, Goldstein, Corporate Indebtedness to Shareholders: "Thin Capitalization" and Related Problems, 16 Tax L. Rev. 1, 35-36 (1960). Perhaps more important with respect to the instant case is the fact that the transfer of these operating assets was part of the plan whereby the corporate taxpayer was formed and enabled to commence operations.

It is the taxpayers' argument that this transfer should be treated as a "sale" independent of the incorporation transaction and thus outside the purview of Section 351. (Br. 27-34.)<sup>7</sup> However, as an essential step in the formation of the corporation, the transfer of the operating assets to it clearly represents a part of the transaction falling under Section 351. *Truck Terminals, Inc. v. Commissioner*, 314 F. 2d 449 (C.A. 9th);

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<sup>7</sup>The taxpayers argue that the asset transfer should be viewed as an independent sale, but the District Court made the following pertinent observation (I-R. 18):

Here the equipment was not appraised for at least six months after it was transferred to the corporation, and payment was not made for more than three months after its appraisal. Neither rent nor interest was paid; likewise, no instrument evidencing the indebtedness was executed. Payment was delayed until the last day of the taxable year because, as one of the Murphy brothers testified, the brothers did not want to pay the bank any more interest than they had to.

*Houck v. Hinds*, 215 F. 2d 673, 676 (C.A. 10th); *Gunn v. Commissioner*, 25 T.C. 424, 436, affirmed *per curiam*, 244 F. 2d 408 (C.A. 10th). See also, *Helvering v. Limestone Co.*, 315 U.S. 179, 184; *ACF-Brill Motors Co. v. Commissioner*, 189 F. 2d 704, 707 (C.A. 3d), certiorari denied, 342 U.S. 886. That the corporate taxpayer was formed for the very purpose of taking over these assets (II-R. 9), that the assets were transferred within a month thereafter (I-R. 14), that the logging contracts with Crown-Zellerbach were then entered into (I-R. 14), and that at a later date the corporation received its \$1,500 paid-in capital, certainly establish that each of the steps was an integral part of the incorporation to be examined under Section 351. Indeed, if a corporation's controlling shareholders can so easily disassociate an integral step in the formation of a corporation merely by calling it a sale, then Section 351 might as well be considered an election section. Of course it is not an option provision. *Truck Terminals, Inc. v. Commissioner*, 314 F. 2d 449, 457 (C.A. 9th); *Pocatello Coca-Cola Bottling Co. v. United States*, 139 F. Supp. 912, 915 (Idaho); Bittker, *Federal Income Taxation of Corporations and Shareholders* (Student ed., 1964), pp. 103-104.

*Taft v. Commissioner*, 314 F. 2d 620 (C.A. 9th),



and *Miller's Estate v. Commissioner*, 239 F. 2d 729 (C.A. 9th), cited by taxpayers (Br. 28) are not to the contrary. In both cases the only question was whether purported debt in fact represented an equity investment, and the applicability of Section 351 was not in issue. This would seem to be equally true of *Haley v. United States* (Ore.) decided November 24, 1959 (60-1 U.S.T.C., par. 9169); *Perrault v. Commissioner*, 25 T.C. 439; *J. I. Morgan, Inc. v. Commissioner*, 30 T.C. 881, appealed and reversed on another issue, 272 F. 2d 936 (C.A. 9th); *Tauber v. Commissioner*, 24 T.C. 179; and *Brown v. Commissioner*, 27 T.C. 27, all cited by taxpayers. (Br. 28.) Moreover, in discussing the bailout aspects of such "sale" cases as *Perrault* and *Morgan*, one commentator has said (Goldstein, Corporate Indebtedness to Shareholders: "Thin Capitalization" and Related Problems, 16 Tax L. Rev. 1, 58-59 (1960)):

Regardless of the ultimate success of the business, the transfer of the physical plant and basic machinery must have been a contribution to the corporation's capital at the time. Until such a transfer took place, there was no corporate enterprise in the economic sense. It would seem that this was precisely the type of transaction that section 351 was designed to cover, since there was complete continuity of interest in the business.

Taxpayers point to the fact that the interests of

Peter Murphy and Harry Murphy in the assets were changed on the transfer to the corporate taxpayer. (Br. 30-31.) Since prior to the transfer this very equipment was being leased to another corporation owned by the Murphys merely for what would be the depreciation (II-R. 6), it would seem that the income produced by the equipment was in fact being shared equally by the Murphys through the earnings of the lessee corporation. Also, when consideration is given to the close relationship of the Murphys, and the fact that they were drawing equal salaries of \$25,000 per year from the partnership (I-R. 2), it is submitted that the District Court properly did not attach great weight to the disproportionate interests in considering whether to treat the transferred equipment as a capital contribution. See *Reed v. Commissioner*, 242 F. 2d 334 (C.A. 2d); *Dodd v. Commissioner*, 298 F. 2d 570 (C.A. 4th); *Foresun, Inc. v. Commissioner*, 348 F. 2d 1006 (C.A. 6th); *Schine Chain Theatres, Inc. v. Commissioner*, decided April 12, 1963 (P-H Memo T.C., par. 63, 106).

Moreover, the change in proportionate interests with respect to assets transferred in a corporate organization is not supposed to affect the applicability of Section 351. Its predecessor statute (Section 112(b)(5) of the 1939 Code) required that for the section to be

applicable the stock and securities received by each transferor had to be substantially in proportion to his interest in the property prior to the exchange. This requirement caused difficulty in application, some courts contrasting the net change to each transferor in his share of the total property transferred with his share of the total stock and securities received (e.g., *Mather & Co. v. Commissioner*, 171 F. 2d 864 (C.A. 3d), certiorari denied, 337 U.S. 907) and other courts contrasting the percentage of gain or loss of each transferor in relation to property transferred by him (e.g., *United Carbon Co. v. Commissioner*, 90 F. 2d 43 (C.A. 4th)). See Hoffman, The Substantial Proportionment Requirement, 5 Tax L. Rev. 235 (1950). The 1954 Code dropped the proportionate interest requirement as a factor in the nonrecognition of gain. S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 264-265 (3 U.S.C. Cong. & Adm. News (1954) 4621, 4902) comments on this change as follows:

In eliminating the proportionate interest test, your committee intends that no gain or loss will be recognized to a transferor transferring property to a corporation under section 351, irrespective of any disproportion of the amount of stock or securities received by him as a result of the transfer. Thus, if M and N each owning property having a value of \$100 transfers such property to a newly formed corporation X, and M receives all of the stock, such transaction would not be subject to tax

under section 351. To the extent, however, that the existing disproportion between the value of the property transferred and the amount of stock or securities received by each of the transferors results in an event taxable under other provisions of this code, your committee intends that such distribution will be taxed in accordance with its true nature. \* \* \*

In any case in which the stock and securities received are not in proportion, the transaction will be treated as if the stock and securities had first been received in proportion and then some of such stock and securities had been used to make gifts, to pay compensation, or to satisfy obligations of any kind.

See also, Treasury Regulations on Income Tax (1954 Code), Section 1.351-1 (b) (1) (Appendix A, *infra*).

Taxpayers refer to Sections 1239, 1245 and 1250 of the 1954 Code<sup>8</sup> and argue that because these sections do not apply here the Government is seeking a judicial solution to a problem that Congress should be asked to supply. (Br. 32-34.) We fail to understand this argument, because we agree that these three sections are obviously not applicable. However, Section 351 is a Congressional determination with respect to incorpora-

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<sup>8</sup>Section 1245 was added to the 1954 Code by Section 13(a) of the Revenue Act of 1962, P.L. 87-834; Section 1250 was added by Section 231 of the Revenue Act of 1964, P.L. 88-272, 78 Stat. 19.

tion transactions which clearly applies to the instant case.

Taxpayers argue that even if the transfer of assets to the corporate taxpayer is considered as part of the transaction of incorporation under Section 351, nevertheless the cash received by the Murphy brothers is "boot" under Section 351(b). (Br. 34-35.) If this contention were correct, then the gain on the exchange to the extent of this "boot" would be taxable, and a corresponding basis adjustment under Section 362(a) would be required. This argument, however, disregards the holding below. The District Court found that the logging equipment transferred to the corporate taxpayer was a capital contribution and that the loan proceeds were received by the Murphys as individuals pursuant to a loan to them from the bank. (I-R. 19.) There was no "boot" flowing to them from the corporation. As we will next consider, the District Court carefully appraised the loan transaction and reached a proper conclusion.

## II

**THE DISTRICT COURT DID NOT ERR IN HOLDING THAT A BANK LOAN OF \$240,000 PURPORTEDLY MADE TO THE CORPORATE TAXPAYER WAS IN SUBSTANCE A LOAN TO HARRY, EDWARD AND PETER MURPHY AS INDIVIDUALS.**

The corporate taxpayer was formed in February, 1959, and began operations in March when it received its operating assets and entered into two contracts with Crown-Zellerbach. (I-R. 13-14.) By the end of July, the corporation had already borrowed \$75,000 from the First National Bank of Oregon. (I-R. 14.) On December 31, 1959, the corporation borrowed an additional \$240,000 from the bank, and \$238,150 of this went immediately to the Murphys' partnership. (I-R. 14.) The bank took no mortgage on the corporation's assets. But what is important is the fact that the loans were guaranteed by the Murphys as individuals. (I-R. 18.) As the District Court noted, these individuals had more than ample assets to justify the bank loans. (I-R. 16, 18.) On the other hand, the corporation's assets left the bank without any cushion as protection for its loan, and both before and after the loan the corporation's asset-to-liability ratio was, at best, one to one. (I-R. 18.) The District Court in the exercise of its wisdom and experience did not believe that the bank would have made such a loan without the guarantee



and that the loan was in fact made to the Murphys as individuals. Cf. *Maurer v. Commissioner*, 30 T.C. 1273, 1290, foot-note 2, and *Ellisberg v. Commissioner*, 9 T.C. 463. Of course, the District Court was entitled to consider the demeanor of the witnesses who testified at the trial and to give their testimony such weight as was warranted under the circumstances. *Wood v. Commissioner*, 338 F. 2d 602, 605 (C.A. 9th).

In *Commissioner v. Court Holding Co.*, 324 U.S. 331, an apartment house was the sole asset of the taxpayer-corporation. The apartment house was transferred as a liquidating dividend to the corporation's two shareholders and they in turn formally conveyed it to a purchaser who had originally negotiated for purchase with the corporation. The Supreme Court sustained the Tax Court in holding that the sale was by the corporation. The applicable principle was stated by the Supreme Court as follows (p. 334):

The incidence of taxation depends upon the substance of a transaction. The tax consequences which arise from gains from a sale of property are not finally to be determined solely by the means employed to transfer legal title. Rather, the transaction must be viewed as a whole, and each step, from the commencement of negotiations to the consummation of the sale, is relevant. A sale by one person cannot be transformed for tax purposes into a sale by another by using the latter

as a conduit through which to pass title. [Footnote omitted.] To permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of the tax policies of Congress.

See also *Schulz v. Commissioner*, 294 F. 2d 52, 56 (C.A. 9th).

In *United States v. Cumberland Pub. Serv. Co.*, 338 U.S. 451, 456, the Supreme Court made it clear that the determination of the factual category in which a particular transaction belongs is a matter within the province of the trial court. As this Court held in *United States v. McNair Realty Co.*, 298 F. 2d 35, 36, it is "for the trial court to draw inferences and determine what the evidence means".

The principle of these cases is fully applicable here. The District Court held as follows (I-R. 19):

The various transactions were a masquerade to enable the brothers to step up the value of greatly depreciated equipment by approximately \$210,000, withdraw it from the business, and pay taxes thereon at the reduced long-term capital gains rates, and at the same time continue to operate the business with the same equipment and with the same degree of control as they did when the equipment was in the partnership.

The real substance of these transactions consisted of a capital contribution of equipment by the

brothers to the corporation and a loan by the bank to the brothers as individuals.

The holding that the corporate taxpayer was used as a mere conduit, with its shareholders as the real borrowers, is a factual conclusion properly reached by the District Court and is not clearly erroneous.

The taxpayers do not claim that if the conclusions of the District Court are sustained, the corporate taxpayer is entitled to the deduction for interest paid to the bank. See *Eskimo Pie Corp. v. Commissioner*, 4 T.C. 669, 675, affirmed *per curiam*, 153 F. 2d 301 (C.A. 3d); *Orange Securities Corp. v. Commissioner*, 45 B.T.A. 24, 31, affirmed, 131 F. 2d 662 (C.A. 5th); *Koppers Co. v. Commissioner*, 8 T.C. 886, 892, on rehearing, 11 T.C. 894, 902. Also, if the conclusions of the District Court are sustained, taxpayers do not deny that while the Murphys individually are entitled to the interest deduction for amounts paid on their behalf as interest by the corporation, payment of the obligation to the bank is dividend income to them as shareholders. See *Schalk Chemical Co. v. Commissioner*, 304 F. 2d 48, 50, 52-53 (C.A. 9th); *Wall v. Commissioner*, 164 F. 2d 462, 464 (C.A. 4th); *Heman v. Commissioner*, 283 F. 2d 227, 231 (C.A. 8th); *Ferro v. Commissioner*, 242 F. 2d 838, 842-843 (C.A. 3d).

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

RICHARD M. ROBERTS,  
*Acting Assistant  
Attorney General.*

LEE A. JACKSON,  
DAVID O. WALTER,  
RICHARD J. HEIMAN,  
*Attorneys,  
Department of Justice,  
Washington, D.C. 20530*

*Of Counsel:*

SIDNEY I. LEZAK,  
*United States Attorney.*

JANUARY, 1966.

**CERTIFICATE**

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: 21st day of January, 1966.

**MICHAEL L. MOREHOUSE**

**Assistant United States Attorney**

## APPENDIX A

Internal Revenue Code of 1954:

## SEC. 163. INTEREST.

(a) *General Rule.* —There shall be allowed as a deduction all interest paid or accrued within the taxable year on indebtedness.

\* \* \*

(26 U.S.C. 1958 ed., Sec. 163.)

## SEC. 351. TRANSFER TO CORPORATION CONTROLLED BY TRANSFEROR.

(a) *General Rule.* —No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation and immediately after the exchange such person or persons are in control (as defined in section 368(c)) of the corporation. For purposes of this section, stock or securities issued for services shall not be considered as issued in return for property.

(b) *Receipt of Property.* —If subsection (a) would apply to an exchange but for the fact that there is received, in addition to the stock or securities permitted to be received under subsection (a), other property or money, then —

(1) gain (if any) to such recipient shall be recognized, but not in excess of—

(A) the amount of money received, plus

(B) the fair market value of such other property received; and

(2) no loss to such recipient shall be recognized.



(c) *Special Rule.* —In determining control, for purposes of this section, the fact that any corporate transferor distributes part or all of the stock which it receives in the exchange to its shareholders shall not be taken into account.

\* \* \*

(26 U.S.C. 1958 ed., Sec. 351.)

### SEC. 362. BASIS TO CORPORATIONS.

(a) *Property Acquired by Issuance of Stock or as Paid-In Surplus.* —If property was acquired on or after June 22, 1954, by a corporation—

(1) in connection with a transaction to which section 351 (relating to transfer of property to corporation controlled by transferor) applies, or

(2) as paid-in surplus or as a contribution to capital,

then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain recognized to the transferor on such transfer.

\* \* \*

(26 U.S.C. 1958 ed., Sec. 362.)

### SEC. 368. DEFINITIONS RELATING TO CORPORATE REORGANIZATIONS.

\* \* \*

(c) *Control.* —For purposes of part I (other than section 304), part II, and this part, the term “control” means the ownership of stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote and at least 80 percent of the total number of shares of all other classes of stock of the corporation.

(26 U.S.C. 1958 ed., Sec. 368.)

## SEC. 1001. DETERMINATION OF AMOUNT OF AND RECOGNITION OF GAIN OR LOSS.

(a) *Computation of Gain or Loss.* — The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 1011 for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) *Amount Realized.* — The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received. In determining the amount realized—

(1) there shall not be taken into account any amount received as reimbursement for real property taxes which are treated under section 164(d) imposed on the purchaser, and

(2) there shall be taken into account amounts representing real property taxes which are treated under section 164(d) as imposed on the taxpayer if such taxes are to be paid by the purchaser.

(c) *Recognition of Gain or Loss.* — In the case of a sale or exchange of property, the extent to which the gain or loss determined under this section shall be recognized for purposes of this subtitle shall be determined under section 1002.

\* \* \*

(26 U.S.C. 1958 ed., Sec. 1001.)

## SEC. 1002 RECOGNITION OF GAIN OR LOSS.

Except as otherwise provided in this subtitle, on

the sale or exchange of property the entire amount of the gain or loss, determined under section 1001, shall be recognized.

(26 U.S.C 1958 ed., Sec. 1002.)

Treasury Regulations on Income Tax (1954 Code):

§ 1.351-1 *Transfer to corporation controlled by transferor.*

\* \* \*

(b) (1) Where property is transferred to a corporation by two or more persons in exchange for stock or securities, as described in paragraph (a) of this section it is not required that the stock and securities received by each be substantially in proportion to his interest in the property immediately prior to the transfer. However, where the stock and securities received are received in disproportion to such interest, the entire transaction will be given tax effect in accordance with its true nature, and in appropriate cases the transaction may be treated as if the stock and securities had first been received in proportion and then some of such stock and securities had been used to make gifts (section 2501 and following), to pay compensation (section 61(a) (1)), or to satisfy obligation of the transferor of any kind.

(2) The application of paragraph (b)(1) of this section may be illustrated as follows:

*Example (1).* Individuals A and B, father and son, organize a corporation with 100 shares of common stock to which A transfers property worth \$8,000 in exchange for 20 shares of stock, and B transfers property worth \$2,000 in exchange for 80 shares of stock. No gain or loss will be recognized under section 351. However, if it is determined that

A in fact made a gift to B, such gift will be subject to tax under section 2501 and following. Similarly, if B had rendered services to A (such services having no relation to the assets transferred or to the business of the corporation) and the disproportion in the amount of stock received constituted the payment of compensation by A to B, B will be taxable upon the fair market value of the 60 shares of stock received as compensation for services rendered, and A will realize gain or loss upon the difference between the basis to him of the 60 shares and their fair market value at the time of the exchange.

*Example (2).* Individuals C and D each transferred, to a newly organized corporation, property having a fair market value of \$4,500 in exchange for the issuance by the corporation of 45 shares of its capital stock to each transferor. At the same time, the corporation issued to E, an individual, 10 shares of its capital stock in payment for organizational and promotional services rendered by E for the benefit of the corporation. E transferred no property to the corporation. C and D were under no obligation to pay for E's services. No gain or loss is recognized to C or D. E received compensation taxable as ordinary income to the extent of the fair market value of the 10 shares of stock received by him.  
(26 C.F.R., Sec. 1.351-1.)

## **APPENDIX B**

### **EXHIBIT B I**

#### **CONSTRUCTION, BALLASTING, AND/OR ROAD IMPROVEMENT CONTRACT**

**THIS AGREEMENT**, Made and entered into as of the 1st day of March, 1959, by and between CROWN ZELLERBACH CORPORATION, a Nevada Corporation, hereinafter called the "Corporation", and MUR-

PHY TIMBER COMPANY, an Oregon corporation, 836 Pacific Building, Portland, Oregon, hereinafter called the "Contractor" (the term "Contractor" as used in the singular herin [sic] shall likewise apply to a corporation and/or two or more individuals operating under an assumed name or as co-partners).

\* \* \*

2. LABOR, EQUIPMENT AND MATERIAL: The Contractor shall furnish all labor, equipment, material and supplies necessary to complete the work provided for herein, except as may be hereinafter specifically stated.

\* \* \*

5. TERM: The term of this Contract shall be from the date hereof to and including December 31, 1959, and time being of the essence, the Contractor agrees to aggressively prosecute said work at all times so as to complete performance hereunder at the earliest possible date, but in any event not later than the above said date.

\* \* \*

No. 20281

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**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

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MURPHY LOGGING CO., successor by merger to  
Murphy Timber Co.; HARRY C. MURPHY and  
DOROTHY SHEA MURPHY; EDWARD J.  
MURPHY and VIRGINIA C. MURPHY;  
PETER C. MURPHY and DOROTHY Z. MURPHY,  
*Appellants,*  
v.

UNITED STATES OF AMERICA,  
*Appellee.*

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*On Appeal from the Judgment of the United States  
District Court for the District of Oregon*

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**BRIEF FOR THE APPELLANTS**

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CHARLES P. DUFFY  
JOYLE C. DAHL  
DUFFY, STOUT & GEORGESON  
*Attorneys*  
1404 Standard Plaza  
Portland, Oregon





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**United States**  
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PETER C. MURPHY and DOROTHY Z. MURPHY,  
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v.

UNITED STATES OF AMERICA,  
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*On Appeal from the Judgment of the United States  
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---

**BRIEF FOR THE APPELLANTS**

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**OPINION BELOW**

The opinion of the District Court (R. 13) is reported  
at 239 F. Supp. 794.

**JURISDICTION**

This appeal involves federal income taxes for the  
calendar years 1959 and 1960 in respect to the individual



appellants and the fiscal years ended February 29, 1960, and February 28, 1961, in respect to the corporate appellant.

Following an audit of the appellant's income tax returns for the years involved, and on April 11, 1963, the Commissioner of Internal Revenue mailed notices of deficiencies to each of the appellants and subsequently assessed and collected additional taxes and interest asserted to be due (R. 5-7). Timely claims and amended claims for refund were filed by each of the individual appellants, and timely claims for refund were filed by the corporate appellant (R. 7-8). Under date of October 8, 1963, the appellants received statutory notices of disallowance in respect to their claims (R. 8). Within the time provided by Section 6532 of the Internal Revenue Code of 1954 and on November 14, 1963, appellants brought an action in the United States District Court for the District of Oregon for the recovery of the taxes paid (R. 27). Jurisdiction existed in the District Court under 28 U.S.C., Section 1346(a)(1). Judgment was entered May 17, 1965 (R. 20, 27). Within 60 days and on June 22, 1965, the appellants filed their Notice of Appeal (R. 21, 27). Jurisdiction is conferred upon this Court by 28 U.S.C., Section 1291.

### QUESTIONS PRESENTED

1. Whether certain indebtedness incurred by Murphy Timber Co., a corporation, was its own obligation, as contended by appellants, or was actually the obligation of its individual shareholders, as contended by the appellee.

2. Whether certain logging equipment owned by Murphy Lumber Co., a partnership, was sold to Murphy Timber Co., as contended by appellants, or was transferred tax-free to the corporation in exchange for its stock under Section 351(a) of the Internal Revenue Code of 1954, as contended by appellee.

3. In the event the transaction involving the logging equipment is held to be a tax-free exchange, whether the cash proceeds received by the individual shareholders of Murphy Timber Co., in addition to the stock, constitute "other money or property" within the purview of Section 351(b) of the Internal Revenue Code of 1954.

## STATUTES INVOLVED

The pertinent provisions of the Internal Revenue Code of 1954 are set forth in the Appendix, *infra*.

## STATEMENT

For many years, Harry C. Murphy, Edward J. Murphy and Peter C. Murphy, three brothers, have been successfully engaged in various aspects of the lumber business (Tr. 4).<sup>1</sup> Prior to the taxable periods in controversy, they were equal owners of all of the outstanding stock of Murphy Logging Co., an Oregon corporation, which was operating under logging and road construction contracts with Crown Zellerbach Corporation near Grande Ronde, Oregon (Tr. 5-7). The operating assets

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<sup>1</sup> "Tr." references are to the transcript of proceedings contained in Volume II of the record on appeal.

of the corporation were leased from Murphy Lumber Company, a partnership in which Harry C. Murphy held a  $53 \frac{1}{3}$  per cent interest, Edward J. Murphy held a  $33 \frac{1}{3}$  per cent interest, and Peter C. Murphy held a  $13 \frac{1}{3}$  per cent interest (R. 2).

In the fall of 1958, Murphy Logging Co. entered into an agreement with Santiam Lumber Company, a corporation owned by unrelated interests, to engage in contract logging for that company near Santiam, Oregon, an area over one hundred miles from Grande Ronde (Tr. 9). To conduct these operations, the corporation purchased the necessary logging equipment from Santiam (Tr. 9).

The Crown contracts were due to expire in the spring of 1959, but negotiations for renewal were successful (Tr. 8-9). At this point it was decided that it would be advantageous to keep the two logging operations separate (Tr. 9). Thereupon, Murphy Timber Co. was incorporated under the laws of the State of Oregon on February 2, 1959, with a stated capitalization of \$1,500, represented by 15 shares of \$100 par value stock which was issued equally to Harry C. Murphy, Edward J. Murphy and Peter C. Murphy (R. 2). This corporation then acquired the new contracts with Crown Zellerbach which had been negotiated by its shareholders (R. 3, Exs. B(1), B(2)).<sup>2</sup>

Prior to this time, Peter C. Murphy had been ex-

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<sup>2</sup> Murphy Timber Co. was subsequently merged with Murphy Logging Co. under circumstances having no bearing on the instant case, but which accounts for the fact that Murphy Logging Co. is one of the appellants herein.

pressing dissatisfaction over the fact that he was receiving only 13 1/3 per cent of the profits resulting from the leasing of the logging equipment by the Murphy Lumber Company partnership, whereas Harry C. Murphy was receiving 53 1/3 per cent (Tr. 21). The brothers thus agreed in early 1959 to discontinue their practice of having a corporation conduct the logging and road construction operations in Grande Ronde using equipment leased from the partnership, and decided to sell the equipment to Murphy Timber Co. at a fair price to be determined by independent appraisal (Tr. 10-14). In this manner, each of the Murphys would thereafter share equally in the profits earned under the Crown contracts after the purchase price of the equipment had been paid.

Under date of March 1, 1959, Murphy Timber Co. entered into a contract to purchase certain logging equipment from the Murphy Lumber Company partnership for a price equal to its appraised value (R. 2-3, Ex. A). Later in the year an independent appraiser, A. E. Vanstrom, determined the total value of the equipment involved to be \$238,150 (R. 3, Ex. C). On or about December 31, 1959, Murphy Timber Co. paid the agreed purchase price in cash to the Murphy Lumber Company partnership (R. 3).

Several times during the year 1959, Murphy Timber Co. borrowed funds from the First National Bank of Oregon upon executing promissory notes bearing interest at six per cent, payable quarterly (R. 4, Exs. I(1), I(2), I(3)). The notes were personally guaranteed by

each of the Murphy brothers (R. 4, Exs. Y(1), Y(2), Y(3)). The first series of loans totalled \$75,000, with the proceeds used mainly for operating expenses (R. 17). The second series of loans totalled \$240,000, with the proceeds used to purchase the equipment from Murphy Lumber Company (R. 17).

As a result of the continuing successful results obtained from the Crown contract, Murphy Timber Co. had substantial earnings from the outset from which it was able to repay the bank. The first series of loans was completely repaid by August 2, 1960 (Ex. H). Of the second series of loans, \$75,000 had been repaid by the end of 1960 (Ex. H). Further repayments were deferred, however, upon the advice of counsel, because of the assertions being made by the Internal Revenue Service examiner which ultimately led to this case (Tr. 14-15).

The Murphy Lumber Company partnership reported the gain it realized on the sale of the logging equipment on its partnership return of income for the calendar year 1959, and each partner reported his distributive share of partnership gain on his joint individual income tax return for that year (R. 3). Following the purchase, Murphy Timber Co. used cost as its tax basis for the equipment acquired (Exs. U, V).

Upon audit of the individuals' and the corporation's income tax returns for the years involved, the examining Internal Revenue agent contended that the sale of the logging equipment should be treated as a nontaxable exchange and that the corporation's basis in the equipment

should be the same as it was when owned by the partnership (R. 4-5). He also contended that Murphy Timber Co. was "thinly capitalized" and that, therefore, the indebtedness to the bank incurred by Murphy Timber Co. should be treated as actually the obligation of the corporation's individual shareholders. Thus, in his view, when the corporation repaid the bank it was conferring constructive dividends upon the shareholders (R. 4-5). These contentions were upheld by the lower court (R. 13-19).

### **SPECIFICATION OF ERRORS**

The District Court erred in holding and deciding:

1. That amounts borrowed by Murphy Timber Co., a corporation, from a bank were, in effect, borrowed by the individual shareholders of the corporation.
2. That the agreement of March 1, 1959, between Murphy Lumber Company, a partnership, and Murphy Timber Co., a corporation, effected a tax-free exchange of property for the stock of said corporation.

### **SUMMARY OF ARGUMENT**

#### **I**

The District Court, in holding that Murphy Timber Co. was "thinly" capitalized, erroneously relied upon the imbalance between the company's stated paid-in capital and its indebtedness, and the fact that assets necessary to conduct its business were acquired with the loan proceeds. The Court failed to consider and correctly ap-



praise other elements of value which enhanced the equity of the company such as its going concern value, the background, experience, and ability of its management, and the fact that it received two valuable contracts to perform logging and road building services for no additional consideration.

Moreover, regardless of the capitalization of the company, the District Court erred in approving the unique realignment of the transactions with the bank suggested by the Internal Revenue Service. The parties intended the corporation to be the primary obligor on the notes, and the doctrine of substance over form was improperly used by the Court in holding that the individual shareholders were the real borrowers.

## II

Section 351(a) of the Internal Revenue Code of 1954, which permits a tax-free transfer of property to a corporation solely in exchange for its stock, should not be applied where the parties intend a bona fide sale. The sale which took place in the instant case was bona fide. It enabled Peter Murphy to acquire twenty per cent of Harry Murphy's interest in the business under an arrangement whereby the purchase price could be paid for out of Peter Murphy's share of the earnings of the corporation's business.

## III

In the event it is held that the tax-free exchange provisions of Section 351 are applicable, the cash consideration received by the individual shareholders should be treated as "other money or property" within the meaning of Section 351(b).

## ARGUMENT

### I

**The Indebtedness Incurred by Murphy Timber Co. Upon Its Borrowings From the Bank Was in Fact Its Obligation and Was Not the Primary Obligation of Its Shareholders Who Guaranteed the Notes.**

#### **A. Introduction**

Throughout this action it has been the government's theory that it may realign the loans made by the bank to Murphy Timber Co. as loans made directly to the company's individual shareholders. It claims that this unique action is proper because of its assertion that the company was inadequately or "thinly" capitalized. We know of no cases adopted or supporting such a position. The District Court, however, accepted the government's theory, concluding that the company was thinly capitalized, and described as a "masquerade" (R. 19) what we believe were normal commercial loan transactions with a large, established bank.

It is our position that Murphy Timber Co. was not undercapitalized for the purpose for which it was organized, and that the District Court failed to consider and correctly appraise all of the material elements bearing upon this question. We also contend that, regardless of the company's capitalization, the recasting of the transaction with the bank by the government and the District Court was contrary to law.

**B. Murphy Timber Co. Was Not Undercapitalized.**

The question of "thin capitalization" has been before this Court on numerous occasions and in various contexts. In a recent case it was held to present a mixed question of law and fact. *Taft v. Commissioner*, 314 F.2d 620 (9th Cir. 1963). Therefore, the conclusion reached by the District Court in respect to the capitalization of Murphy Timber Co. is subject to independent review on the essentially undisputed evidence adduced at trial, and without limitation by the "clearly erroneous" rule contained in Rule 52(a) of the Federal Rules of Civil Procedure (28 U.S.C., 1958 ed.).

Murphy Timber Co. was formed with a stated paid-in capital of \$1,500. In determining that the company was undercapitalized, the District Court emphasized this fact and pointed out that it was necessary for the company to borrow \$240,000 with which to acquire the equipment necessary to carry on its operations (R. 17). In reaching its conclusion, we submit that the District Court erred in considering only the stated capital of the company and in its implied assertion that the underlying operating assets of the company must be supported by equity capital.

This Court has repeatedly held that the actual value of the equity capital of a company is the important factor in these cases and not the amount of capital stated on its balance sheet. In *Estate of Miller v. Commissioner*, 239 F.2d 729 (9th Cir. 1956), a corporation was formed with an initial capital investment of \$1,050. The three shareholders then advanced a total of \$50,000 to the company for operating expenses. Subsequently, the

company purchased all of the assets of the shareholders' partnership for \$86,622.49, issuing its note therefor. The Commissioner of Internal Revenue, noting the nominal stated capital of the company, asserted that the payments on the notes, which were made from the company's earnings, should be treated as dividends and not repayments of principal. The Tax Court agreed with the Commissioner;<sup>3</sup> but this Court reversed the decision upon determining that the real value of the equity investment was much greater than its stated value. This result was based upon an estate tax appraisal of the value of the stock shortly after formation of the corporation and the fact that the business had a favorable earnings history and potential.

In *Sheldon Tauber*, 24 T.C. 179 (1955), Acq. 1955-2 C.B. 9, a corporation was formed with a stated capital of \$100. It then purchased the assets of the shareholders' partnership for \$209,453.38, giving notes equal to the amount of the purchase price. In addition to the nominal stated paid-in capital, the corporation acquired from its shareholders certain "assets called good will" which were not reflected on its balance sheet.<sup>4</sup> Moreover, busi-

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<sup>3</sup> 24 T.C. 923 (1955). The reasoning contained in the Tax Court's opinion is remarkably similar to the reasoning of the District Court in the case at bar. For example, the Tax Court stated (p. 931): "The record before us satisfies us that the partners were in fact investing, and not selling their business for notes. Formal capital was nominal in amount, and grossly inadequate in view of the normal needs of the business operations anticipated. The partners had been in the same business for many years, and we are satisfied that they were well aware of this inadequacy."

<sup>4</sup> These assets consisted of the excess value of the assets purchased over their cost value as a going business, backlog of orders, and the background and experience of the personnel running the company. 24 T.C. at 181.

ness prospects were excellent at the time of transfer. The Commissioner made substantially the same argument he made in *Estate of Miller, supra*, but it was rejected by the Tax Court which, after considering the intangible assets acquired by the company, found that it was adequately capitalized.

This same reasoning was again applied by the Tax Court in *Ainslie Perrault*, 25 T.C. 439 (1955). In that case two brothers, who were partners, formed a corporation with a stated capital of \$2,000. They then sold the partnership assets to the corporation for \$973,000, taking back a note. In addition to these assets, the corporation received, for no additional consideration, orders or unbilled items of the partnership, good will having a substantial value, and rental contracts which immediately began producing sizeable earnings for the corporation. Again the Commissioner asserted that the corporation was inadequately capitalized, pointing to the nominal balance sheet capital account. The Tax Court, however, following *Tauber*, held that the real value of the equity capital of the corporation was substantially higher than its stated value, and declined to hold that the debt should be treated as equity.

We submit that the District Court failed to evaluate adequately the real equity contribution to Murphy Timber Co. The record discloses that the company received considerably more in value upon its incorporation than \$1,500 in cash. It purchased an established operating logging business which had been highly profitable for a price equal to the appraised value of its individual tan-



gible assets. Thus, the corporation acquired, without additional consideration, the value inherent in the logging business as a going concern. This was a valuable intangible asset<sup>5</sup> which enhanced the value of the equity capital of the corporation. *Conestoga Transportation Co.*, 17 T.C. 506 (1951), Acq. 1952-1 C.B. 2.

The corporation also acquired the operational skills of the three Murphy brothers whose background, experience and ability in the lumber business has been unquestioned. While there was no formal management contract with the brothers which would enable this item to be considered a specific asset of the corporation, the fact remains that the company could certainly expect the Murphy brothers to continue its management. In valuing the business, this expectation would be a material factor. *United States v. Cornish*, 348 F.2d 175 (9th Cir. 1965). As Frank Morrow, the bank officer who approved the loans in question, put it (R. 26-28):

Q. (By Mr. Duffy): Mr. Morrow, how long have you dealt with the loan account of Harry Murphy, Edward Murphy, Peter Murphy and the various Murphy organizations?

A. Oh, actually dealing with them—we'll go back—I'm talking about handling their loans—eight years, going back to the time they came in the bank. I have known the Murphys; I have known what they have done; I have seen their files.

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<sup>5</sup> See, Wixon, *Accountants' Handbook*, Fourth Ed., p. 19:34 (Ronald Press). In effect, going concern value represents that portion of the value of a particular business as an integral operating entity which exceeds the total value of each of the business' individual assets valued separately. *United States v. Cornish*, 348 F.2d 175 (9th Cir. 1965).



Q. At the time that you were asked to make these loans to Murphy Timber Co. corporation, were you acquainted with their past business history in the logging business?

A. Definitely so.

\* \* \* \* \*

THE COURT: Well, I think this one is pretty clear. If they had borrowed, you wouldn't have loaned the money to a \$1,500 corporation where the amount of the loan equaled the amount of the used equipment, would you?

THE WITNESS: In their case, I wouldn't mind at all.

THE COURT: Even if they didn't sign personally?

THE WITNESS: Yes, even if they hadn't. As I recall, I don't think I even asked for a guarantee. I think it was offered to me.

In addition, the company also received two valuable contracts with Crown Zellerbach for no additional consideration. These contracts were essentially renewals of what in the past had been lucrative contracts held by Murphy Logging Co. The District Court refused to consider these contracts in the capitalization of the company, stating that there was no evidence offered of their value (R. 17). We submit that the record contains the best evidence available on this point, and that is the earnings and cash flow actually generated by them.<sup>6</sup>

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<sup>6</sup> It is to be noted that we are not concerned with fixing a value for the contracts on the date of incorporation wherein the relevant evidence would only include information available on that date. Here, we are merely attempting to show that the contracts received by the company had value. Thus, the performance obtained from them is highly relevant and, is, in fact, the

The corporate income tax return for Murphy Timber Co. for its fiscal year ended February 28, 1960 (Ex. U), discloses that the company had a net income after taxes and depreciation of \$20,978.69 for its first full year under the Crown contracts. Depreciation claimed on the return was \$75,124.38. Thus, the company generated funds in the total amount of \$96,103.07 during that year after payment of all costs and expenses. The company's cash receipts journal (Ex. AA) further shows the amount of gross proceeds received under the contracts for the year, which the company began to realize almost immediately after it commenced performing its logging and road building services. A breakdown is shown below:

#### CASH RECEIPTS FROM CROWN CONTRACTS

April, 1959 ....\$	578.58	Oct., 1959 .....	\$105,821.71
May, 1959 ....	26,111.09	Nov., 1959 ...	75,254.64
June, 1959 ....	86,477.78	Dec., 1959 .....	83,887.54
July, 1959 ....	62,784.11	Jan., 1960 ....	78,842.38
August, 1959	47,622.94	Feb., 1960 .....	21,150.72
Sept., 1959 ....	125,565.10	TOTAL .....	\$714,096.59

These figures demonstrate that the Crown contracts had considerable value. Moreover, their worth in the lumber industry cannot be understated. It is well known that many of the individuals and firms involved in lumber are essentially concerned with the performance of services, whether it be logging, hauling, road construction, or a combination thereof. The securing of contracts to perform these services is, therefore, of utmost import-

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most accurate evidence available. See *Ainslie Perrault, supra*, at 451, in respect to the results obtained by the corporation involved there on certain rental contracts it received.

ance to the success of their business. This is illustrated by the following testimony of Peter Murphy (Tr. 22-23):

MR. DUFFY: \* \* \* a corporation like this could operate without having to put any money down; that is, the \$1,500 capitalization wouldn't mean anything, because even if they didn't have a dollar, they could go down to any equipment dealer, if they had a reputation, and start out on that basis.

THE COURT: It would be kind of hard to get \$200,000 of equipment from Western or logging contractors or any of the others, wouldn't it?

THE WITNESS: No, it wouldn't, Judge, and it happens almost every day in our business, and that is why one of the competitive things about our business is that you can—the equipment companies are loaded with this type of used equipment, and they're happy *if you got a contract* in which to put it to work, to let you have that equipment on a lease basis or rental purchase or any other basis as long as you have the reputation that you can do the job. (emphasis supplied)

This economic fact in the industry has been important in tax litigation in cases involving the adequacy of a company's capitalization. In *Haley v. United States*, 60-1 U.S.T.C., para. 9169 (D.C. Ore. 1959),<sup>7</sup> a partnership had been engaged in contract logging for a large lumber company. Upon receiving advice from an attorney that a change in the form of business was necessary, the partners formed a corporation with a stated paid-in capital of \$3,000. The partnership then sold its assets

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<sup>7</sup> Not officially reported.

to the corporation for approximately \$50,000 with the two major partners becoming creditors of the corporation. The corporation also received, without additional consideration, the contract to perform logging services. In holding against the government's contention that the repayment of the loans constituted dividends, the District Court (Judge Kilkenney) determined that the corporation was adequately capitalized for the reason that the logging contract was a valuable asset of the corporation because it enabled the company to obtain outside credit without the shareholders giving their personal guarantee or subordinating their claims.

We submit that *Haley* supports our position in the case at bar despite the fact that the loans to Murphy Timber Co. were personally guaranteed by its shareholders. As noted before, Mr. Morrow, the bank officer, testified that he did not recall asking for the guarantees but thought they were voluntarily given (Tr. 27). He further stated that he was relying on the personal integrity and ability of the Murphy brothers in respect to the contracts which the company held, and not the guarantees (Tr. 29-31). Contrary to the District Court's conclusion (R. 19),<sup>8</sup> we believe that Mr. Morrow's testimony reflects the probable state of mind of most creditors who deal successfully with certain individuals and

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<sup>8</sup> The District Court concluded that the "bank officer stretched the truth for a good customer on facts that did not and probably would never occur" (R. 19). What facts the Court had reference to we are not told. Moreover, although we recognize that the trial judge is entitled to accept or reject testimony in the exercise of his discretion, we submit that the record does not warrant the Court's statement to the effect that the bank officer "obviously . . . did not expect anyone to believe his testimony" (R. 19).

their business entities over a substantial period of time. No doubt a similar attitude prevailed between the debtor and the outside creditors in *Haley* since, obviously, an outside creditor would not loan a substantial sum to a corporation solely on the basis of a nominal capital account.

The value of a favorable logging contract was also emphasized by the Tax Court in the similar case of *J. I. Morgan, Inc.*, 30 T.C. 881 (1958), reversed and remanded as to another issue, *Commissioner v. J. I. Morgan*, 272 F.2d 936 (9th Cir. 1959). There, a corporation was formed with a stated capitalization of \$10,000 to continue a contract logging business formerly conducted as a proprietorship. The corporation then contracted to purchase the operating assets of the business for \$500,000 and assumed its liabilities in the amount of \$129,682.55. Answering the government's assertion that the corporation was not adequately capitalized, the Tax Court stated (p. 892):

Petitioner's ability to conduct its operations with small capital is accounted for at least in part by the fact that its principal asset, outside of its logging equipment, was a contract with Boise Payette Lumber Company to perform all of its logging operations.

The Commissioner of Internal Revenue announced his acquiescence to the decision in *Morgan* on the thin capitalization issue in 1959-1 C.B. 4.

The going concern value, the operational talents of management and the Crown contracts were not pur-



chased by either Murphy Timber Co. or its predecessor partnership. Therefore, quite properly, they were not reflected on the books and balance sheet of the company which includes only assets and liabilities at cost. Nevertheless, they were in fact contributed to the company by its shareholders as part of its equity capital. The fact that no specific value for these items was shown should be of no consequence. In *Ainslie Perrault, supra*, the Tax Court in a similar situation stated (p. 451):

\* \* \* We have not thought it necessary to determine the value of each separate asset that passed to the Corporation, but we have no hesitation in determining that they were of large value amounting to several hundred thousand dollars and constituted such an ample investment in the Corporation as to preclude any justification for holding under the thin capitalization doctrine that the transferred assets under the purchase agreement of January 5, 1948, should in substance be considered capital rather than a bona fide sale by the stockholders to the corporation. *John Kelly Co. v. Commissioner*, 326 U.S. 521; *Rowan v. United States*, 219 F.2d 51; *Sun Properties, Inc. v. United States*, 220 F.2d 171; *Sheldon Tauber*, 24 T.C. 179.

We submit that when the overall shareholder contribution to the capital account of Murphy Timber Co. is considered in the light of its true value, and bearing in mind the nature of the business involved, the company should not be deemed to have been undercapitalized.

In addition to erroneously relying upon the nominal stated capital of the company, the District Court also implied in its opinion that the necessary operating assets



of the company should be supported by equity capital (R. 17). This notion has been alluded to at times by the Tax Court. *Sam Schnitzer*, 13 T.C. 43 (1949), affirmed per curiam, *Schnitzer v. Commissioner*, 183 F.2d 70 (9th Cir. 1950) cert. denied, 340 U.S. 911 (1951); *Estate of Miller*, 24 T.C. 923 (1955), reversed, *Estate of Miller v. Commissioner*, 239 F.2d 729 (9th Cir. 1956). It has also been firmly rejected in more recent cases by the same court. *Sheldon Tauber, supra*; *J. I. Morgan, Inc., supra*; *Paul F. Murphy*, 21 T.C.M. 1161 (1962). Nearly all of the significant cases decided by this Court involving the incorporation of a going business have also rejected it.

In *Earle v. W. J. Jones & Son, Inc.*, 200 F.2d 846 (9th Cir. 1952), the taxpayer corporation and others formed a new corporation with a stated capital of approximately \$1,000 for the purpose of exploiting a mine in Mexico. Loans of over \$300,000 were made to the new corporation by its shareholders to finance the venture. When the business failed, the taxpayer claimed a bad debt deduction on its return for the advances made. The government contended that they should be treated as capital losses because they were in fact capital contributions. This Court held that the advances were true debt regardless of the fact that they were placed at the risk of the business, stating (p. 851):

\* \* \* To say that the advances were "gambled" and placed at the risk of the business does not help appellants. All unsecured loans involve more or less risk.

It is also clear from the facts in *Estate of Miller v. Commissioner, supra*, that in upholding the claimed in-

debtedness, this court attached little or no weight to the fact that necessary assets were being acquired from its shareholders by a newly formed corporation in exchange for debt obligations. There, an entire going business was acquired for debt by a corporation which was nominally capitalized.

Similarly, in *Taft v. United States*, *supra*, decided by this court in 1963, an electrical business previously operated as a sole proprietorship, was incorporated with a stated capital of \$750. The corporation purchased all of the assets necessary for the conduct of the business from the individual proprietor giving its promissory note therefor. Despite the fact that essential assets were acquired from the person who was also the corporation's major shareholder, this Court held that the creditor position taken by the transferor was proper.

These decisions are clearly applicable here, and confirm the fact that it is quite normal for businesses to incur indebtedness in the acquisition of some or all of its basic assets.<sup>9</sup> We submit that when a debtor-creditor relationship is intended, even in respect to the purchase of assets essential to the business, that relationship should be respected for tax purposes. As this court stated in *Estate of Miller*, *supra*, at p. 734:

\* \* \* We know of no rule which permits the Commissioner to dictate what portion of a corporation's operations shall be provided for by equity financing rather than by debt. It is common knowl-

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<sup>9</sup> The trial judge himself recognized this point (at least during the trial) when he stated (Tr. 18): "Most businesses when they organize borrow money, don't they?"

edge that the choice of procedures in this regard will vary from corporation to corporation and we think that it cannot be said that any particular method of issuance of stock and incurrence of indebtedness can be labeled as "normal," and hence subject to approval by the Commissioner.

**C. Regardless of the capitalization of Murphy Timber Co., the unique realignment of the loan transactions with the bank by the District Court was unwarranted.**

This court has repeatedly held that a corporation may enter into a debtor and creditor relationship with its shareholders. *Taft v. Commissioner, supra*; *Estate of Miller v. Commissioner, supra*; *Earle v. W. J. Jones & Son, Inc., supra*; *Wilshire & Western Sandwiches, Inc. v. Commissioner*, 175 F.2d 718 (9th Cir. 1949); *Maloney v. Spencer*, 172 F.2d 638 (9th Cir. 1949); *Commissioner v. Proctor Shop, Inc.*, 82 F.2d 792 (9th Cir. 1936). As we observed in the preceding discussion, this has been true even though the corporation was nominally capitalized.

We recognize, however, that the government may step in and assert in a particular case that what the parties labeled as a loan or debt is in fact an investment of equity capital. *Sam Schnitzer, supra*. This is the well known "thin capitalization" doctrine.

Prior to the case at bar, however, the government has ordinarily used this argument only in situations where the shareholders have attempted to place themselves in the dual role of creditors of their corporation under circumstances which disclose that they really intended the alleged loans to be capital contributions. In these cases

the government has simply argued that the claimed instruments of indebtedness should be treated as the equivalent of stock. See *Kruse Grain & Milling v. Commissioner*, 279 F.2d 123 (9th Cir. 1960). Thus, it merely redetermines the character of the obligation.

Now, for the first time, the government is attempting to employ the thin capitalization doctrine to materially disturb the relationship of the parties involved in a common commercial banking transaction. The individual Murphy brothers, for sufficient reasons of their own, decided to consolidate their Grande Ronde logging operation into a single corporation. Since the corporation was to be the vehicle for conducting the business, quite understandably, the Murphys intended that the corporation itself was to be the primary obligor on its business loans. This was also the understanding of the bank representatives who approved the loans (Tr. 28-30). When the individual Murphy brothers, who had insulated themselves from the business entity by incorporating, affixed their names to the corporation's notes as guarantors, they naturally assumed that they were incurring only a guarantor's secondary liability.

We are sure the government will agree that there is a very real difference between being primarily obligated on a note and being only secondarily liable. Yet its argument in this case glosses over this material distinction on the alleged claim that the primary obligor was thinly capitalized. It thus misapplies a well developed doctrine to an entirely unrelated situation.<sup>10</sup> It is quite apparent

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<sup>10</sup> Perhaps the government is troubled by the fact that the

that by this device the government is attempting to squeeze dividends and the resulting tax thereon out of a situation where dividends were neither intended nor contemplated. In *Taft v. Commissioner, supra*, involving a similar attempt by the government, this Court stated (p. 623):

In conclusion it is interesting to observe that in 1954 Taft had \$106,931.82 in tax paid assets which he transferred to the corporation. In 1959, when he was repaid, he still had only \$106,931.82. However, the Commissioner seeks a double taxation. He treats the payments as dividends, and insists that Taft should pay taxes thereon. Under our holding he need not.

We anticipate that the government will seek to find some support for its position in *Putnam v. Commissioner*, 352 U.S. 82 (1956). In that case the taxpayer was a shareholder of a publishing company and assisted in its financing by making advances to it and by guaranteeing its salaries and debts. The venture was eventually abandoned and the taxpayer was forced to pay on his guarantees. He claimed the payments on his return as an ordinary loss from a transaction entered into for profit under Section 23(e)(2) of the Internal Revenue

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guarantors are financially interested in the primary obligor on the notes. This apparently was the situation in *Ellisberg*, 9 T.C., 463 (1947), where a father guaranteed his son's note to the bank even though he knew there was no reasonable expectation of repayment. The Tax Court held that, in effect, the father borrowed the money from the bank directly and made a gift of the proceeds to his son. The father's claimed loss was, therefore, disallowed. This case is clearly distinguishable from the case at bar because here all parties involved expected the primary obligor to pay off its notes. Moreover, the case at bar involves business relationships between the parties and not the personal, family relationship involved in *Ellisberg*.



Code of 1939.<sup>11</sup> The government successfully contended, however, that the payments were only deductible as a short term capital loss on the ground that they should have been treated as nonbusiness bad debts within the meaning of Section 23(k) of the 1939 Code.<sup>12</sup> In upholding the government's contention, the Supreme Court simply stated that when the guarantor was forced to pay on his guarantee he became subrogated to the rights of the original creditor. With this premise announced, it then held that the loss sustained by the guarantor unable to recover from the debtor was by its very nature a loss from the worthlessness of a debt. Included in the Court's opinion is the following statement (pages 92-93):

\* \* \* There is no real or economic difference between the loss of an investment made in the form of a direct loan to a corporation and one made indirectly in the form of a guaranteed bank loan.

This analysis by the Supreme Court in a case involving an entirely different issue does not assist the government in the case at bar. There, the court was merely characterizing a taxpayer's loss which had been incurred. To him it made no "real or economic difference" whether it be considered a direct or indirect loan because in either event he lost his money. In the instant case, however, this is not true. Here the parties intended that the bank be repaid with corporate business profits since the money

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<sup>11</sup> Now Section 165(c)(2) of the Internal Revenue Code of 1954.

<sup>12</sup> Now Section 166(d) of the Internal Revenue Code of 1954.



was borrowed for use in acquiring and conducting the corporation's business.<sup>13</sup> Thus, it was important economically to the parties involved that the corporation was to be the real borrower and not the individual Murphy brothers who were not personally engaged in conducting the logging business and who would not personally have the business profits generated by the corporation with which to repay the loan.

It should be noted that the government's theory requires engaging in a three-way fiction, i.e., constructive shareholder borrowing, constructive capital contribution, and constructive payment for the shareholders' account. Apparently the District Court found this too much to accept alone, however, because in its opinion it felt compelled to also conclude that the substance of the banking transactions were contrary to their form (R. 19).

The doctrine of substance over form is well known in the tax law, having its genesis back in the early case of *Weiss v. Stearn*, 265 U.S. 242 (1924). It is not to be applied without restraint, however, as the opinion handed down in *Gregory v. Helvering*, 293 U.S. 465 (1935), cautions (p. 469):

The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted \* \* \*.

To this we should add the pertinent comment of the Court of Appeals for the Second Circuit in *Nassau Lens*

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<sup>13</sup> This is commonly known as "bootstrap" financing. See discussion at pages 30-31 *infra*.

*Co., Inc. v. Commissioner*, 308 F.2d 39 (2d Cir. 1962) at page 44:

\* \* \* In short, the courts have not attributed to Congress a general purpose underlying the entire Code to deprive the taxpayer in each case of freedom to choose between legal forms similar in broad economic sense but having disparate tax consequences.

In the case at bar the formal relationship between Murphy Timber Co., its shareholders, and the bank was consistent with the substance of the transactions into which the parties intended to and, in fact, did enter.<sup>14</sup> A legitimate form of business reorganization was consummated, and the financial arrangements employed were normal and consistent with the parties' purpose. This point is amply demonstrated by the manner in which the bank was repaid and by other conduct of the parties long before the Internal Revenue examiner came upon the scene.

## II

**The Transaction Whereby Murphy Timber Co. Acquired Certain Logging Equipment From the Murphy Lumber Company Partnership Was a Sale for Cash and Was Not an Exchange of the Equipment for Stock.**

By contract dated March 1, 1959, Murphy Timber Co. acquired certain itemized logging equipment from

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<sup>14</sup> Whether the lower court misapplied the doctrine of substance over form is subject to full review by this court. See *Twin Oaks Co. v. Commissioner*, 183 F.2d 385 (9th Cir. 1950). It is a conclusion of law, or, at least, a mixed question of law and ultimate fact. *Weible v. United States*, 244 F.2d 158 (9th Cir. 1957).

the Murphy Lumber Company partnership for the total cash consideration of \$238,150 (Ex. A). The price was determined by an independent appraisal of each of the assets involved (R. 3). The appraisal was of considerable importance in effecting the sale because of the conflicting interests of two of the individuals involved in the selling partnership and purchasing corporation (Tr. 10, 13, 22). The corporation borrowed the necessary funds for making the purchase from a bank with the loan bearing interest at the rate of six per cent.

Despite the fact that the parties clearly intended a sale, the examining internal revenue agent contended that the transaction should be viewed as a transfer of equipment to the corporation in a tax-free exchange for its stock within the purview of Section 351(a) of the Internal Revenue Code of 1954. Under this theory he rejected the corporation's use of cost as the basis for the assets acquired from the partnership, and contended that Section 362 of the Code applied to limit the corporation's basis for the assets to their basis when held by the partnership.

The question of the application of Section 351(a) to a transfer of property to a corporation where the parties intended a sale has arisen many times. *Taft v. Commissioner, supra*, *Estate of Miller v. Commissioner, supra*, *Haley v. United States, supra*, *Ainslee Perrault, supra*, *J. I. Morgan, supra*, and *Sheldon Tauber, supra*.<sup>15</sup> These

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<sup>15</sup> See also, *Warren Brown*, 27 T.C. 27 (1956), Acq. 1957-2 C.B. 4, involving a logging company, and the recent case of *Charles E. Curry*, 43 T.C. No. 54 (1965), and cases cited therein.

cases were discussed above at length, and in each instance it was held that a bona fide sale took place. The government's argument that Section 351 should supplant the intended sale was rejected.

We recognize that the government has successfully applied Section 351(a) to certain transfers to closely held corporations. For example, in *Truck Terminals, Inc. v. Commissioner*, 314 F.2d 449 (9th Cir. 1963), several individuals owned stock in Fleetlines, Inc. and Truck Terminals, Inc., the latter a dormant corporation. The individuals involved decided to activate Truck Terminals as a subsidiary of Fleetlines so their stock in Truck Terminals was sold to Fleetlines for \$5,000. Truck Terminals then purchased some heavy equipment from Fleetlines for \$221,150, payable in installments. Subsequently, Fleetlines advanced \$195,000 to Truck Terminals to enable Truck Terminals to pay off the balance due on the contract so that it could secure outside loans using the equipment as collateral. Still later, the \$195,000 advance was cancelled by the issuance of additional stock to Fleetlines. The government successfully urged that Fleetlines had merely transferred the equipment to Truck Terminals in exchange for stock. Although couched in the form of a sale, it is clear that an exchange was all that really occurred because in the end all Fleetlines held was stock in Truck Terminals with Truck Term-

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In *Curry* the Tax Court stated: "The non-applicability of Section 351 appears to have been assumed in all the cases cited in the preceding paragraph. This rule appears so well settled that we would not feel justified in overturning it even if we were convinced it be erroneous. However, we are not so convinced."

inals possessing the equipment formerly owned by Fleetlines.<sup>16</sup>

Another theory prevailed for the government in *Pocahontas Coca-Cola Bottling Co. v. United States*, 139 F. Supp. 912 (D.C. Ida. 1956). There, a corporation purchased assets to conduct its business from its shareholders for \$244,000 in notes. The government asserted that the transaction was merely an exchange for stock on the ground that the character of the notes was such that they should be treated as stock or securities under Section 351(a). The notes provided that they were to be paid only out of the net earnings of the business and that they were to be subordinated to the claims of all general creditors of the corporation. Thus, quite understandably, it was held that the notes should be treated as preferred stock.

These cases do not support the government's contention that Section 351(a) should be applied in the case at bar. Here the sale was made for cash. It would be difficult indeed to attribute to cash any of the equity characteristics of stock. Thus, the government apparently chooses to ignore the cash consideration involved on the theory that it was really borrowed by the individuals. This is simply not what happened.

In addition to winding up the partnership as a leasing entity, the sale served to enable Peter Murphy to purchase twenty percent of Harry Murphy's interest in

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<sup>16</sup> Essentially, the same approach, i.e., the single transaction doctrine, was applied in *Houck v. Hinds*, 215 F.2d 673 (10th Cir. 1954).



the business. The manner in which the transaction was carried out resulted in Harry Murphy immediately receiving cash for his twenty percent interest, and Peter Murphy being able to pay for it out of his share of the earnings of the business.

The purchase of an interest in a business to be paid for out of its earnings has been described as a "bootstrap" acquisition.<sup>17</sup> It is a common business technique and has been favorably recognized for tax purposes. *Commissioner v. Clay Brown*, 380 U.S. 563 (1965), affirming this Court, 325 F.2d 313 (9th Cir. 1964). *Jewell v United States*, 330 F.2d 761 (9th Cir. 1964). When Peter Murphy purchased a portion of Harry Murphy's interest in the business through the use of his share of the corporate earnings, this well-known practice was being employed. It was similarly used in *Sheldon Tauber*, *supra*, and *Charles E. Curry*, *supra*, to realign interests in a business, and received the approval of the Tax Court.

We gather that the chief reason for the government's distress over the sale is caused by the fact that Murphy Timber Co. claimed a basis for the assets acquired equal to their cost.<sup>18</sup> This result occurs, of course, in any situation where the parties intend a bona fide sale. Section

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<sup>17</sup> In *Lange*, *Bootstrap Financing: The Redemption Technique*, 18 Tax L. Rev. 323 (1963), it is stated: "Bootstrap financing may be defined as the use of assets or credit of a purchased business to cover part or all of the purchase price."

<sup>18</sup> Unlike many cases in this area, the government could not be concerned with an attempt to bail out corporate earnings to the shareholders under the guise of interest because here the interest was paid to the bank.



1012 of the Internal Revenue Code of 1954, Appendix, *infra*. We submit that as long as the sale transaction does not run afoul of any provision of the Internal Revenue laws it should be respected. The Tax Court appears to have accepted this point even under circumstances where the securing of tax benefits may have been the only reason for the sale. Its opinion in the *Curry* case, *supra*, contains the following statement:

Respondent contends there was no "business purpose" for the sale of the corporation. It would seem that the mere desire to sell, even if the sole purpose was to realize capital gains, should be a sufficient business purpose (assuming always that the substance complies with the form). *Sun Properties v. United States* (220 F.2d 171, 5th Cir. 1955). Indeed it is difficult to imagine what added business purpose respondent would want for a sale of property.

The government has long been concerned with the tax benefits inherent in the sale of depreciable business property to a controlled corporate entity. In 1951 it obtained legislative relief when Congress added Section 117 (o) to the Internal Revenue Code of 1939.<sup>19</sup> This section does not attack the basis of the asset purchased but treats the gain realized by the seller as ordinary income rather than capital gain. It applies only to sales between an individual and a corporation in which the individual, his spouse, minor children, and minor grandchildren own more than 80 percent of the corporation's outstanding stock. Thus, clearly, it does not apply to the

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<sup>19</sup> Now Section 1239 of the Internal Revenue Code of 1954.

sale to Murphy Timber Co. However, the Treasury's proposed bill would have included the sale to Murphy Timber Co. The House of Representatives version of the bill would have applied the section to a sale by an individual to a corporation under certain circumstances solely because the individual's brothers also held stock in the corporation. H. Rep. No. 586, 82nd Cong., 1st Sess., 2 U.S.C. Cong. & Adm. News 1910 (1951). This proposal failed to pass the Senate. S. Rep. No. 781, 82nd Cong., 1st Sess., 2 U.S.C. Cong. & Adm. News 2041 (1951). A compromise was reached in Conference, however, which resulted in the passage of the section as it now reads. H. Conference Rep. No. 1213, 82nd Cong., 1st Sess., 2 U.S.C. Cong. & Adm. News 2135 (1951). It is significant that the attribution of stock between brothers was eliminated. Thus, the government in this case is requesting the Court for relief in an area after failing to receive it from Congress.

Subsequent to the taxable years involved herein, the Treasury again approached Congress for even broader relief in respect to sales of depreciable property regardless of the relationship between the seller and purchaser. Sections 1245 and 1250 were added to the Internal Revenue Code in 1962 and 1964, respectively.<sup>20</sup> These provisions require the seller of depreciable personal property and, under certain circumstances, a seller of depreciable real property to report certain portions of the gain realized upon the disposition of these assets as ordinary income rather than capital gain. These provisions, of

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<sup>20</sup> Revenue Act of 1962, P.L. 87-834, § 13, 76 Stat. 1032. Revenue Act of 1964, P.L. 88-272, § 231, 78 Stat. 100.

course, are not applicable in the case at bar. However, they further demonstrate that the proper forum for adopting rules relating to the sale of depreciable assets is the legislature and not the courts.

### III

**In the event the transaction involving the logging equipment is held to be an exchange for stock, the additional cash received by the shaerholders of Murphy Timber Co. constituted "other money or property."**

It is our contention that because the parties intended a sale, there was no tax-free exchange under Section 351 (a) of the Internal Revenue Code of 1954, Appendix, *infra*. However, if the Court determines that an exchange of property for stock occurred, then since cash was also paid to the individual shareholders by Murphy Timber Co., the "boot" provision of Section 351(b), Appendix, *infra*, is applicable.

Essentially, Section 351(b) provides that when "other money or property" is paid by a corporate transferee to a shareholder transferor in addition to the stock issued in a transaction falling under Section 351(a), then gain will be recognized to the shareholder transferor to the extent of the "other money or property" received. This results in a corresponding basis adjustment to the corporation under Section 362(a).

The lower court summarily rejected this argument without stating its reasons (R. 19). As best we can determine, it apparently did so by ignoring the cash and deciding that the equipment was transferred to the corporation solely in exchange for its stock. We submit that

the cash consideration paid by Murphy Timber Co. cannot be so easily dismissed. In substance as well as form it was paid by the corporation to the individual Murphys whether by sale or in conjunction with an exchange for stock. It is simply a misstatement of what really occurred to say that the individuals borrowed the money from the bank and nothing more.

### CONCLUSION

It is clear that the Murphys intended a taxable event to occur upon the transfer of their partnership business to the corporation with a resulting change in the proportionate ownership of the business. They paid taxes accordingly on their individual returns for the year in which the transaction occurred (R. 3, Exs. E, F and G). The corporation, therefore, should not be denied its correct basis for the equipment acquired. The government's unique approach to find dividends where none were intended, and its attempt to limit the basis for the assets sold where no limitation should be made, should be rejected.

For these reasons, the judgment of the District Court should be reversed.

Respectfully submitted,

CHARLES P. DUFFY  
JOYLE C. DAHL  
DUFFY, STOUT & GEORGESON  
1404 Standard Plaza  
Portland, Oregon

**CERTIFICATE**

It is hereby certified that counsel for appellants have examined the provisions of Rules 18 and 19 of this Court and are of the opinion that this brief conforms to all requirements.

CHARLES P. DUFFY

JOYLE C. DAHL

October, 1965

**APPENDIX**

Internal Revenue Code of 1954 (26 U.S.C., 1958 ed.):

**SEC. 351. TRANSFER TO CORPORATION  
CONTROLLED BY TRANSFEROR**

(a) *General Rule.*—No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation and immediately after the exchange such person or persons are in control (as defined in section 368(c)) of the corporation. For purposes of this section, stock or securities issued for services shall not be considered as issued in return for property.

(b) *Receipt of Property.*—If subsection (a) would apply to an exchange but for the fact that there is received, in addition to the stock or securities permitted to be received under subsection (a), other property or money, then—

(1) gain (if any) to such recipient shall be recognized, but not in excess of—

(A) the amount of money received, plus

(B) the fair market value of such other property received; and

(2) no loss to such recipient shall be recognized.

\* \* \* \* \*

**Sec. 362. BASIS TO CORPORATIONS**

(a) *Property Acquired by Issuance of Stock or as*



*Paid-in Surplus.*—If property was acquired on or after June 22, 1954, by a corporation—

(1) in connection with a transaction to which section 351 (relating to transfer of property to corporation controlled by transferors) applies, or

(2) as paid-in surplus or as a contribution to capital,

then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain recognized to the transferor on such transfer.

\* \* \* \* \*

#### Sec. 1012. BASIS OF PROPERTY—COST

The basis of property shall be the cost of such property, except as otherwise provided in this subchapter and subchapters C (relating to corporate distributions and adjustments) \* \* \*

No. 20280

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**United States Court of Appeals**  
**For the Ninth Circuit**

R. B. RANDS, et ux,  
*Appellants,*

v.

UNITED STATES OF AMERICA,  
*Appellee.*

---

**BRIEF OF PENDLETON GRAIN GROWERS,  
INC., Amicus Curiae**

---

On Appeal from the United States District Court  
for the District of Oregon

---

COREY, BYLER and REW  
222 S. E. Dorion  
Pendleton, Oregon 97801

GEORGE W. MEAD  
1211 Public Service Building  
Portland, Oregon 97204

*Attorneys for Pendleton Grain Growers, Inc.*



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**BRIEF OF PENDLETON GRAIN GROWERS,  
INC., Amicus Curiae**

---

On Appeal from the United States District Court  
for the District of Oregon

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I.

**BACKGROUND—EFFECT ON COMMERCIAL ENTERPRISES  
ON COLUMBIA RIVER**

The filing of this brief Amicus Curiae in behalf of Pendleton Grain Growers, Inc., was authorized by Order of this Court, dated September 27, 1965.

The ruling of Honorable John F. Kilkenny, Judge of the United States District Court for the District of Oregon, in advance of trial, that the value of lands as a port site was not a compensable interest, vitally effects Pendleton Grain Growers, Inc., whose grain elevator, lo-



cated on the banks of the Columbia River at Umatilla, Oregon, has been taken by the government by power of eminent domain. This grain facility is now the subject of a proceeding in the United States District Court for the District of Oregon entitled United States of America vs. Pendleton Grain Growers, Inc., No. 65-303.

The elevator, which is pictured in this brief, is a transshipment point between rail and water and truck and water, moving an annual harvest of almost four million bushels of grain downstream by barge to lower river ports on the Columbia River. This grain is funnelled through the Umatilla Elevator from the rich and fertile wheat fields of Eastern Oregon, and Eastern Washington. The total grain storage capacity of this elevator is 335,000 bushels, although outside storage slabs handle additional grain during rush seasons. Obviously the grain is not held at this location, but merely transshipped to river transportation from truck and rail, which haul from the farms and highway elevators located inland from the river. This elevator has complete barge loading facilities and a dock extending into the Columbia River and provides a maximum loading capacity to barges of 65,000 bushels per eight hour shift.

In view of Judge Kilkenney's ruling in this case, it is probable that Pendleton Grain Growers, Inc., will be prohibited from showing to a jury any evidence of valuation of its land on the Columbia River for a port site,

although it has operated this enterprise as a port site, and utilized the waters of the Columbia River to ship its grain since 1938.

We earnestly believe that the ruling of the Court below in determining that the constitutional requirement of full market value for the highest and best use of the property condemned may be diminished by the navigation power of the United States in this case and in other cases now pending in the District of Oregon is an unusual application of the rule and should not be asserted as applicable to riparian owners on the Columbia River at the few available port sites.

In the interests of brevity we shall address ourselves to cases applicable to the issue of admissible evidence to show value for purposes of condemnation of fast lands, in particular for port site development along the Columbia River behind the John Day dam. We wholeheartedly support the other points argued by the Appellants and feel they have been soundly argued and further reference to those questions would be superfluous.

## II.

### **ARGUMENT**

**The Government Must Compensate the Owner of Property for Port Site Value of Fast Lands if Such is the Highest and Best Use to be Made of such Lands.**

Unquestionably the rule persists that the government must pay the owner of fast lands under condemnation, market value evidenced by its highest and best use. *United States ex rel, T.V.A. v. Powelson*, 319 U.S. 266, 275 (1943) Highest and best use is influenced by the natural resources which either join or are near the property taken. Query: If the highest and best use of property is for port site purposes can evidence of such a fact be admitted? It is the contention of the Appellants that this question must be answered affirmatively. The government contends that the Supreme Court has established the law contrary to Appellants' position and that it does not have to compensate Appellants for their riparian rights in the land taken.

Riparian property rights are:

“\* \* \* (1) Use of water for general purposes, as bathing, domestic use, etc.

(2) To wharf out to navigability.

(3) Access to navigable waters \* \* \*”

*Hilt v. Weber*, 233 N.W. 159, 168 (Mich. 1930)

In this case we are concerned with the riparian right of access to navigable waters.

The government relies on Supreme Court dicta in *United States v. Virginia E. & P. Co.*, 365 U.S. 624, 629

(1961) referring to the denial of compensation for riparian property rights in language following:

“Thus, just as the navigational privilege permits the Government to reduce the value of riparian lands by denying the riparian owner access to the stream without compensation for his loss . . . (citing cases) . . . *it also permits the Government to disregard the value arising from this same fact of riparian location in compensating the owner when fast lands are appropriated.*” (Emphasis added)

That portion of the above quotation which is not emphasized is well documented with authorities, while the concluding and emphasized phrase is not supported by authorities and is not necessary to the decision of the Court. That the statement is dicta is shown by the defining of the main issue as follows:

“\* \* \* The basic issue is thus whether the respondent’s easement might be found to have value other than in connection with the flow of the stream \* \* \*”  
Id. at 629-630.

Furthermore, it is important to note that the Court did not overrule any prior authorities contradictory to the emphasized statement. See, *United States v. Kansas City Life Ins. Co.*, 339 U.S. 779 (1950) To date the Supreme Court has gone no further than to hold that a riparian landowner does not have a compensable right

in the flow of a navigable stream. *United States v. Twin City Power Co.*, 350 U.S. 222, 225-226 (1956).

We submit that it is not necessary to riparian usage to rely upon flow of a stream and specifically it is not necessary to the use of land for a port site to be concerned with whether or not the water upon which the fast land abuts is in fact "flowing." The power dam cases in which no compensation is allowed to the owner of fast lands above high water level, *Olson v. United States*, 292 U.S. 246 (1933); *United States v. Willow River Power Co.*, 324 U.S. 499 (1945); *United States v. Chandler-Dunbar W.P. Co.*, 229 U.S. 51 (1913); *United States v. Virginia E. & P. Co.*, *supra*, obviously involve "flowing" streams.

Although the government need not compensate a riparian owner for benefits attributable to the flow of the stream, such holdings do not conflict with Appellants' position that compensation should be paid for their port site. Appellants' position is supported by the following statement:

"The exception taken to the inclusion as an element of value of the availability of these parcels of land for lock and canal purposes must be overruled. That this land had a prospective value for the purpose of constructing a canal and lock parallel with those in use had passed beyond the region of the purely conjectural or speculative. That one or more additional parallel canals and locks would be needed to meet the increasing demands of lake traffic was

an immediate probability. This land was the only land between the canals in use and the bank of the river. Although it is not proper to estimate land condemned for public purposes by the public necessities or its worth to the public for such purpose, it is proper to consider the fact that the property is so situated that it will probably be desired and available for such purpose." *United States v. Chandler-Dunbar W.P. Co.*, 229 U.S. 51, 76-77 (1913).

It is impossible to distinguish availability for lock and canal purposes for which compensation was required in *Chandler-Dunbar*, from availability for a port site as urged in the case at bar.

To deny compensation for location of Appellants' land on the Columbia River and its availability and adaptability as a port site is to conclude that the location of land is not to be considered as a factor in arriving at value. It has long been the established law in cases not dealing directly with fast lands that location of the property is proper evidence to be admitted on valuation of land. *United States v. 5 Acres of Land, More or Less, Situate in Town of Babylon, Suffolk County, N.Y.*, 50 F. Supp. 69 (E.D.N.Y., 1943); *Thatcher v. Tennessee Gas Transmission Co.*, 84 F. Supp. 344 affd. 180 F2d 644 (5th Cir. 1950); *United States v. 585.87 Acres of Land, More or Less, Osage County, Kansas*, 210 F. Supp. 585 (D. Ka., 1962); *Gwathmey v. United States*, 215 F2d 148 (5th



Cir. 1954). In addition the Supreme Court has indicated that location of lands may under some circumstances give them special value. *United States v. Twin City Power Co.*, 350 U.S. 222 (1956). The contention that the proximity of Appellants' lands to the river is improper proof of value is unsupported by the authorities.

For the court to deny such evidence is really to deny any evidence of the commercial value of land along the Columbia River although the commercial purpose is not related to the flow of the river and involves only access to the river. The unfairness of such a holding is emphasized by the location of the Pendleton Grain Growers' Umatilla elevator on the Columbia River as exhibited herein.

As has been cogently argued in Appellants' brief, even as against the government, the owner of fast lands has access to the river. (App. Br., pg. 27-33) This right of access is a valuable property right entitled to compensation. *United States v. Kansas City Life Insurance Co.*, *supra*; *United States v. 2477.79 Acres of Land*, 259 F2d 23 (5th Cir. 1958); *United States v. River Rouge Imp. Co.*, 269 U.S. 411 (1926).

### III.

### CONCLUSION

We have presented in this brief, hoping that it will be of assistance to the Court, some additional reasons

for admission of evidence of the value of port sites to the owners of fast lands along a navigable stream. The effect of the denial of such evidence on commercial enterprises along the Columbia River is obvious. We trust that the Court will not regard our selection of this narrow discussion as an indication that the other points argued by Appellants are not equally sound; to the contrary, we believe them to be so adequately covered in the brief of Appellants as to require no further argument by us.

On the basis of the foregoing arguments, together with the arguments advanced in Appellants' brief, the judgment should be reversed.

Respectfully submitted,

COREY, BYLER & REW

222 S.E. Dorion

Pendleton, Oregon 97801

276-3331

GEORGE W. MEAD

1211 Public Service Building

Portland, Oregon 97204

228-7686

*Attorneys for Pendleton Grain  
Growers, Inc.*

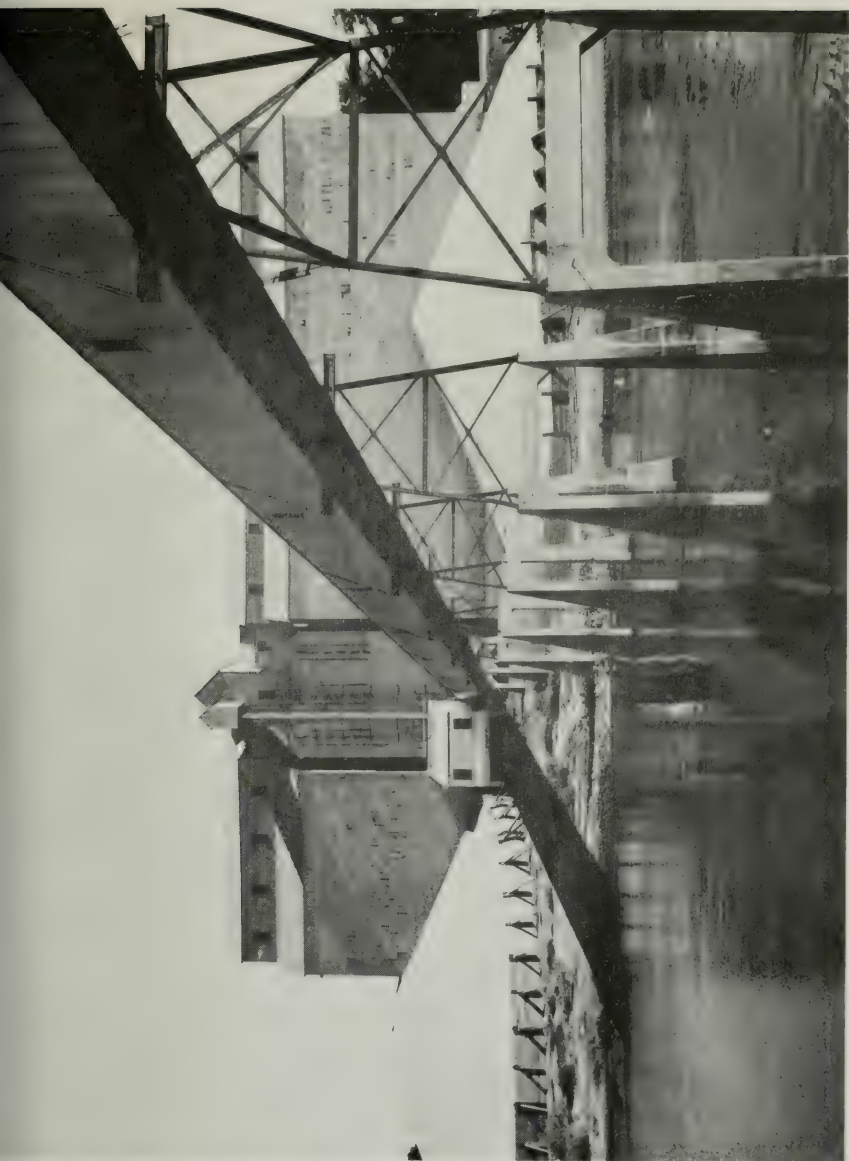
**CERTIFICATE**

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with the applicable parts of said rules.

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*Of Attorneys for Pendleton  
Grain Growers, Inc.*

## APPENDIX



Pendleton Grain Growers, Inc., elevator,  
Umatilla, Oregon



No. 20280

In the  
**United States Court of Appeals**  
**For the Ninth Circuit**

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*Appellants,*

v.

UNITED STATES OF AMERICA,  
*Appellee.*

---

**BRIEF FOR APPELLANT**

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On Appeal from the United States District Court  
for the District of Oregon

---

ALEX L. PARKS  
LLOYD B. ERICSSON  
DUSENBERY, MARTIN, BEATTY & PARKS  
1107 Standard Plaza  
Portland, Oregon

ROBERT B. ABRAMS  
MAHONEY & ABRAMS  
P.O. Box 428  
Heppner, Oregon  
*Counsel for Appellants*

**FILED**

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Rule 6 (b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 25, 50(b), 52(b), 59(b), (d) and (e), 60(b), and 73(a) and (g), except to the extent and under the conditions stated in them. As amended Dec. 27, 1946, effective March 19, 1948 .....5, 6, 9, 44

Rule 60 (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, tac. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power

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of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by a motion as prescribed in these rules or by an independent action. As amended Dec. 27, 1946, effective March 19, 1948; Dec. 29, 1948, effective Oct. 20, 1949.....	5, 6, 9, 44
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(a) Applicability of Other Rules. The Rules of Civil Procedure for the United States District Courts govern the procedure for the condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule.

\* \* \*

(e) Appearance or Answer. If a defendant has no objection or defense to the taking of his property, he may serve a notice of appearance designating the property in which he claims to be interested. Thereafter he shall receive notice of all proceedings affecting it. If a defendant has any objection or defense to the taking of his property, he shall serve his answer within 20 days after the serving of notice upon him. The answer shall identify the property in which he claims to have an interest, state the nature and extent of the interest claimed, and state all his objections and defenses to the taking of his property. A defendant waives all defenses and objections not so presented, but at the trial of the issue of just compensation, whether or not he has previously appeared or answered, he may present evidence as to the amount of the compensation to be paid for his property, and he may share in the distribution of the award. No other pleading or motion asserting any additional defense or objection shall be allowed.

33 U.S.C. § 403 (1958):

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead,



## STATUTES CITED (Cont.)

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jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable, river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; \* \* \* ..... 24

## 33 U.S.C. § 404 (1958):

Where it is made manifest to the Secretary of the Army that the establishment of harbor lines is essential to the preservation or protection of harbors he may, and is, authorized to cause such lines to be established, beyond which no piers, wharves, bulkheads, or other works shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him: \* \* \* ..... 24

## 33 U.S.C. § 578 (a) &amp; (b) (Supp. V 1964) [Pub. L. 86-645, 74 Stat. 480, § 108 (a) &amp; (b)]:

(a) Whenever the Secretary of the Army, upon the recommendation of the Chief of Engineers, determines that notwithstanding the provisions of the Federal Property and Administrative Services Act of 1949, as amended, with respect to disposal of surplus real property, (1) the development of public port of industrial facilities on land which is part of a water resource development project under his jurisdiction will be in the public interest; (2) that such development will not interfere with the operation and maintenance of the project; and (3) that disposition of the property for these reasons under this section will serve the objectives of the project within which the land is located, he may convey the land by quitclaim deed to a State, political subdivision thereof, port district, port authority, or other body created by the State or through a compact between two or more States for the purpose of developing or encouraging the development of such facilities. \* \* \*

(b) Any conveyance authorized by this section shall be made at the fair market value of the land, as determined by the Secretary of the Army, upon condition that the property shall be used for one of the purposes stated in the subsection (a) of this section only, and subject to such other conditions, reservations or restrictions as the Secretary may determine to be necessary for the development, maintenance, or operation of the project or otherwise in the public interest ..... 48

## STATUTES CITED (Cont.)

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## 33 U.S.C. § 595 (1958):

In all cases where private property shall be taken by the United States for the public use in connection with any improvement of rivers, harbors, canals, or waterways of the United States, and in all condemnation proceedings by the United States to acquire lands or easements for such improvements, where a part only of any such parcel, lot, or tract of land shall be taken, the jury or other tribunal awarding the just compensation or assessing the damages to the owner, whether for the value of the part taken or for any injury to the part not taken, shall take into consideration by way of reducing the amount of compensation or damages any special and direct benefits to the remainder arising from the improvement, and shall render their award or verdict accordingly ..... 31

## 33 U.S.C. § 701-1 (b) (1958):

(b) The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining or industrial purposes ..... 37

## 40 U.S.C. § 248a (1958):

In any proceeding in any court of the United States outside the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. \* \* \* .....4, 47

## 43 U.S.C. § 1301 (a) &amp; (e) (1958):

When used in this chapter—

(a) The term “lands beneath navigable waters” means—

(1) all lands within the boundaries of each of the respective States which are covered by non-tidal waters

## STATUTES CITED (Cont.)

PAGE

that were navigable under the laws of the United States at time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and

(3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined; \* \* \*

(e) The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the production of power; .....19, 38, 40

43 U.S.C. § 1311 (a), (d) & (e) (1958):

(a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (a) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with the applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located and the respective grantees, lessees, or successors in interest thereof; \* \* \*

(d) Nothing in this chapter shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the

## STATUTES CITED (Cont.)

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production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power;

(e) Nothing in this chapter shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian, relating to the ownership and control of ground and surface waters; and the control, appropriation, use, and distribution of such waters shall continue to be in accordance with the laws of such states .....37, 38, 39

43 U.S.C. § 1314 (a) (1958):

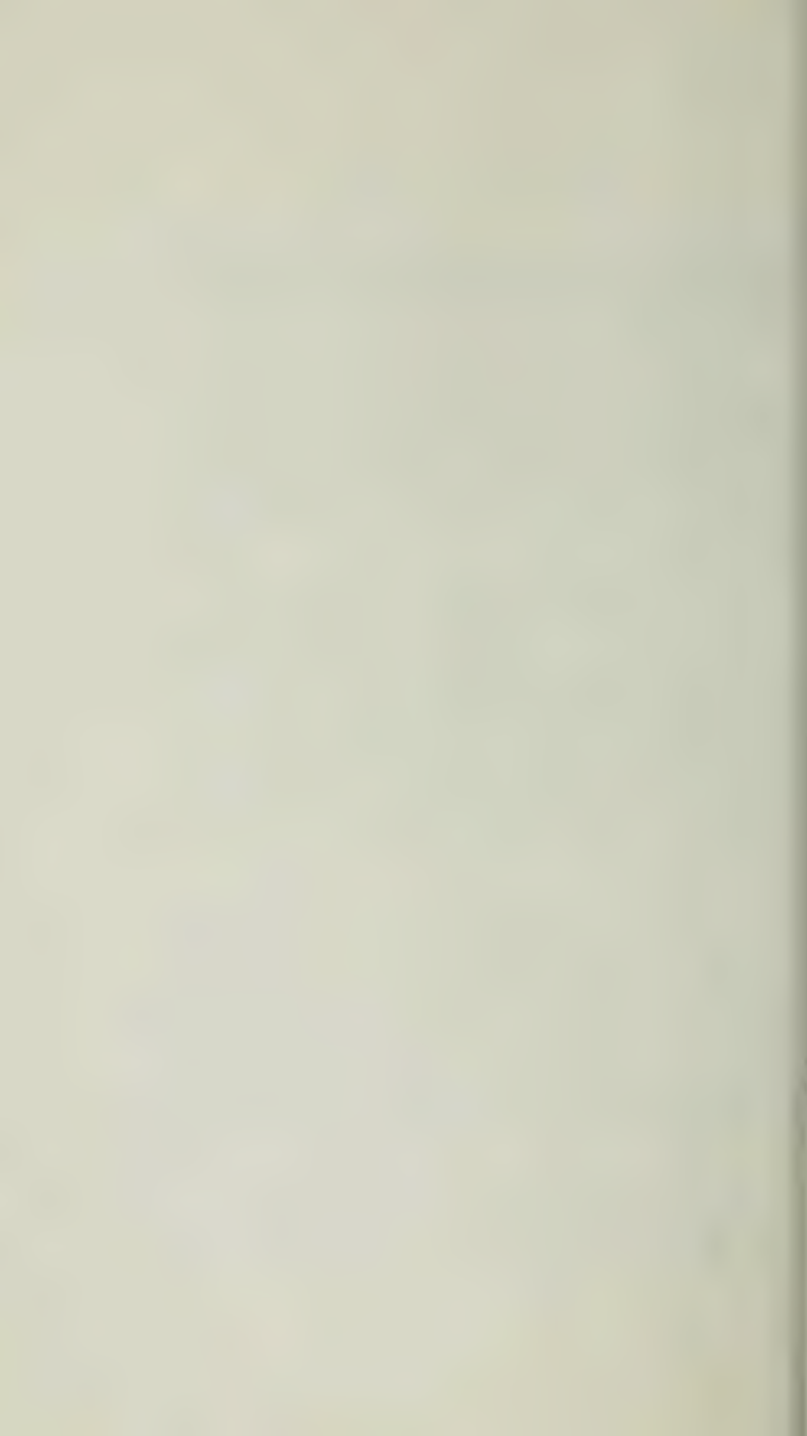
(a) The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 1311 of this title ..... 39

## OTHER CITATIONS

Bickel, *The Supreme Court, 1960 Term*, 75 HARV. L. REV. 41  
(1961) .....21, 22

Fairman, *The Supreme Court, 1955 Term*, 70 HARV. L. REV.  
83 (1961) .....19, 20, 21, 28, 29

Note, *Compensable Value "Taking" of Dam Sites*, 14 STAN.  
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No. 20280

In the  
**United States Court of Appeals**  
**For the Ninth Circuit**

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R. B. RANDS, et ux,  
*Appellants,*

v.

UNITED STATES OF AMERICA,  
*Appellee.*

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**BRIEF FOR APPELLANT**

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On Appeal from the United States District Court  
for the District of Oregon

**JURISDICTION**

Jurisdiction of this Appeal is founded on 28 U.S.C.  
§ 1291 (1958) wherein it is provided:

The courts of appeals shall have jurisdiction of  
appeals from all final decisions of the district courts  
of the United States, except where a direct review  
may be had in the Supreme Court.

The opinions of the District Court are unreported.  
They are found in the Record, at 22, 35, 38 and 68.

Notice of appeal was filed and the appeal was docket-  
ed in this Court. Record at 69, 74 *et seq.*



## QUESTIONS PRESENTED

I. Whether the constitutional requirement of full market value in the highest and best use of condemned uplands may be diminished by the navigation power so as to require less than full compensation?

A. Whether the location of lands next to water must be disregarded to comply with the rule that power site value of lands and flow value of water must be disregarded in condemnation?

B. Whether, assuming the power to deny compensation, policy is found in Acts of Congress indicating that full compensation is to be paid?

II. Whether Rule 71A of the Federal Rules of Civil Procedure stands alone to prescribe procedure for condemnation cases, without regard to the provisions of the other Rules allowing extensions of time for excusable neglect?

## STATEMENT OF FACTS

Appellants own lands on the Columbia River at the site of the historic Castle Rock Landing. This land is and has been through past years bordered by high water, sufficient to permit navigation close to the shore. (Record, hereinafter R., at 54) The location is upriver from the John Day Dam, under construction; it now forms

a part of the "Boardman Space Age Park," an industrial development project of the State of Oregon.

The State of Oregon began seeking lands for this project when it learned, about six years ago, that a major aeronautical company might be induced to locate a testing operation in Eastern Oregon. (R. at 49). The state commenced a site search which culminated in the negotiation of a lease and option to purchase the Appellants' lands (R. at 50.) The option price was approximately \$35,840. (Computed from R. at 56, 57.)

The option was relinquished when the state found it could acquire the land through the use of the federal power of eminent domain, in connection with construction of the John Day Dam. Meanwhile, Oregon had arranged with the federal government an exchange of the Boardman bombing range, the bulk of the "Space Age Park" for state-owned lands elsewhere in the state.

Before Oregon acquired the tract desired for the development project, it had already made a lease (on July 2, 1963) of the property described in the federal government's quitclaim deed. (R. at 58-65.) The lease, but not the appendices thereto, is set forth in full in Appendix A of this Brief. The lease payment is \$60,000 per year. (Appendix A at 66) Oregon paid \$17,500 for the property, according to the federal deed of Sept. 25, 1963. (R. at 58, 64.)

On August 13, 1963, the United States Government filed a declaration of taking in condemnation of certain lands situated along the Columbia River south shore, in the State of Oregon. (R. at 10.) Title was claimed under the provisions of 40 U.S.C. § 258a (1958), which provides that the declaration of taking must declare that "lands are thereby taken for the use of the United States." The Government failed to use the statutory language.

Notice of the taking which specified the 20 day period for answer designated by the Federal Rules of Civil Procedure was served on the Appellants. Appellants filed a notice of appearance, contesting the amount of proposed compensation. (R. at 28.) It had not at this point become apparent to Appellants that grounds existed for challenging the authority of the government to take the land. The initial appearance on behalf of Appellants was made by the firm of Mahoney & Abrams, of Heppner, Oregon. Subsequently consultation was had with the firm of Dusenbery, Martin, Beatty and Parks, in Portland, Oregon. Because of circumstances beyond the control of Appellants, consultation was after the 20 day period allowed by the Rule for making objection to the validity of the taking.

Within 39 days of receipt of the Notice of Taking, Appellants filed a Motion to Amend the Notice of Ap-

pearance, relying on the "excusable neglect" provisions of FED. R. CIV. PROC. 6(b) and 60(b), accompanied by an affidavit reciting the facts stated above, and accompanied by a memorandum with Supplemental Points and Authorities specifying the grounds of objection to the taking which Appellant sought to raise in its Answer (R. at 31.) The government, as Plaintiff, and through the Acting United States Attorney, Sidney Lezak, and Assistant United States Attorney Joseph E. Buley, filed a Memorandum in Opposition to Motion to Amend which generally stated that Rule 71A alone was applicable to the filing of an answer in a condemnation case, but concluded with the statement:

It is the government's view that the affidavit on file in support of the motion does show circumstances which in justice to the defendants should allow them to now file an answer after the twenty days from the service have elapsed.

Apparently the government's position was that legally there was no requirement that the Defendants-Appellants be allowed to amend but that justice in the particular case would be served by allowing the amendment. The government's Memorandum in Opposition took no position on the question of detrimental reliance by the Government on lack of opposition within the twenty day period, and indeed made no reference to the

fact that the Government deeded part of the land in question to the State of Oregon two days before Defendant-Appellants filed their motion to amend. On October 16, 1963, the Honorable John F. Kilkenny, Judge of the United States District Court for the District of Oregon, entered an order denying Appellants' Motion to Amend, on the ground that (1) FED. R. CIV. PROC. 71A (e), concerning eminent domain takings, is not subject to the general authority for discretionary extensions of time contained in FED. R. CIV. PROC. 6 (b) and 60 (b); and (2) that even if those Rules apply, discretion demanded denial of the Motion in this case because a portion of the land in question had been deeded by the Secretary of the Army to the State of Oregon two days prior to the filing of Appellants' Motion to Amend. (R. 35-37.)

The highest and best possible use of the lands taken from Appellants was as a port site. Generally private port site land is not readily available along the Columbia River—land otherwise suitable for ports is either owned by the Government or blocked from land access through the tracks of the Union Pacific Railroad on the Oregon shore, and the Seattle, Portland and Spokane Railroad on the Washington shore. Appellants' lands, however, were and are accessible from land and suitable for use as a port, whether or not the John Day Dam, under construction in the area of Appellants' lands,

was ever built. The lands border the high water line of the Columbia River for a substantial distance in an area with sufficient deep water so that they were and now are suitable for use as a port. (R. at 54)

Appellants sought to establish this fact and the resultant value of the land in its highest and best use as a port site, at the trial on compensation. But it was ruled by the Honorable John F. Kilkenny, Judge of the United States District Court for the District of Oregon, in advance of trial, that the value of the lands as a port site was not a compensable interest because it was subject to the overriding navigational servitude in the United States. (R. at 38-39)

### **SUMMARY OF ARGUMENT**

It is clear that the Government may act as it chooses within the bed of a stream, when it acts under its power over navigation, without the requirement of paying for consequential damage to uplands. It is also clear that uplands, when condemned, may not be valued for use as a power dam site, even though this be the highest and best use of the lands. But it is unreal and not required by the power site doctrine to value lands as though they were located away from water when in fact they are located on water and have value as a port site. An important distinction in the Government power is found in the degree of statutory control over power dam con-



struction, compared to the degree of control over port development. Affirmative findings are necessary for the power dam development, and even then a license is granted subject to many conditions. But only a finding that an obstruction to navigation will be created is sufficient to deny the right which the riparian owner otherwise has to use his lands as a port site.

The power site cases have distinguished value as between private persons from the value as between the Government and the private owner. But in the case of port site development, the Supreme Court has held that as between the Government and the private riparian owner, the right to use lands adjoining a river as a port site does have value, even though the Government could diminish the value by a proper exercise of the navigation power. The point is that the Government has not used its navigation power to diminish the fair market value in a non-compensable fashion. Rather it has taken the whole property at its undiminished value.

Additional support in favor of full compensation here is found in the congressionally declared water policy for the western states, granting more rights to western riparian owners than is otherwise the case. And further, policy is found in the Submerged Lands Act which, though reserving the navigation power, grants all rights of development of lands to the states or

the private owner claiming through the state, excluding only the power site value. The fair implication from this is that port site value is not excluded, but rather is confirmed in the private owner, subject only to navigation power exercise.

Condemnation proceedings in this case were conducted subject to FED. R. CIV. PROC. 71A. That Rule makes all the rest of the Rules applicable to a condemnation case, except at the point of a conflict. FED. R. CIV. PROC. 60 (b) and 6 (b) both allow extensions of time, even after prescribed time has lapsed, upon a showing of excusable neglect. While these rules, read together, require the judge to consider the merits of granting an extension of time, the District Judge ruled that the provisions of Rule 71A stand alone, and did not consider the merits of Appellants' request for extension of time.

## **ARGUMENT**

**I. The constitutional requirement of full market value in the highest and best use of condemned uplands may not be diminished by the navigation power to make compensation less than full.**

**A. The location of lands next to water need not be disregarded in order to comply with the rule that power site value of lands and flow value of water are to be disregarded in condemnation.**

FIFTH AMENDMENT just compensation for waterfront property is the primary point of this case. The government urges that two relatively recent Supreme Court decisions, *United States v. Virginia Elec. Power Co. [Vepco]*, 365 U.S. 624 (1961); *United States v. Twin City Power Co.*, 350 U.S. 222 (1956), bar full compensation here.

Justice Douglas has described the problem:

Basically the problem in this case is to locate a workable and reasonable boundary between Congress' power to control navigation in the public interest and the rights of landowners adjacent to navigable streams and their tributaries to compensation for injuries flowing from the exercise of that power. The Constitution does not require compensation for all injuries inflicted by the exercise of Congress' power. Neither is the power unlimited. The line therefore must be drawn in accommodation of the two interests.

*United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 812, 813 (1950) (dissenting opinion).

The reason why boundary location is becoming more acute is explained in part by Chief Judge Hutcheson of the Fifth Circuit:

This is a period of great governmental expansion, with enormously stepped up numbers of takings of private property for public use by expropriation, a streamlining of the procedures for taking, and, because familiarity breeds contempt, a consequent

growing and, therefore alarming attitude of complacency, instead of viewing with alarm, with which government and public alike look upon the exertion of the power of eminent domain by which all that a man has can be taken from him by force. [Footnote omitted.]

*Slattery Co. v. United States*, 231 F.2d 37, 41-42 (5th Cir. 1956). That case involved an appeal by condemnees from a District Court judgment based on appraisal of the land by appointed Commissioners. The Fifth Circuit reversed because the Commission had not made proper findings.

Since the case is one of a taking for a navigational purpose, we start with the proposition that the Federal Government has almost absolute power over navigation and navigable waters, including the Columbia River, through the constitutional power over interstate and foreign commerce.

But the extent of power claimed by the Government in the present case is not generally available under the commerce clause.

It is not the broad constitutional power to regulate commerce, but rather the servitude derived from that power and narrower in scope, that frees the Government from liability in these cases. When the Government exercises this servitude, it is exercising its paramount power in the interest of navigation, rather than taking the private property of anyone.

*United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 808 (1950).

The "classic description" (*Vepco, supra*, at 628) of the scope of the power is found in *United State v. Chicago, M. St. P. & P.R.R.*, 312 U.S. 592, 596-97 (1941):

The dominant power of the federal government, as has been repeatedly held, extends to the entire bed of a stream, which includes the lands below ordinary high-water mark. The exercise of the power within these limits is not an invasion of any private property right in such lands for which the United States must take compensation. [Citations omitted.] The damage sustained results not from a taking of the riparian owner's property in the stream bed, but from the lawful exercise of a power to which that property has always been subject.

It must be noted that even within these limits, the exercise of the power must be in furtherance of the purpose for which the power exists, that is, in furtherance of navigation. *International Paper Co. v. United States*, 282 U.S. 399 (1931); *United States v. 50 Foot Right of Way*, 337 F.2d 956 (3d Cir. 1964). The very case which set forth most clearly the rights of the Government to act in furtherance of navigation without payment of compensation to those previously occupying the bed of a navigable stream, and upon which *Twin City Power, supra*, and *Virginia Elec. & Power Co., supra*, is strongly base reaffirmed that the legal title to

the bed of the stream is either in the state or the riparian owners, depending upon state law. *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913).

*International Paper*, *supra*, awarded compensation for the exact value for which *Chandler-Dunbar* denied compensation, the value in the flow of the stream. The reason was that International's rights to the water under New York law were curtailed by the federal government in a taking under the war powers, and not under the navigation power. The Court commented, in denying the government's argument that the water right was a mere revocable license, that "the Secretary of War did not attempt to pervert the powers given to him in the interest of navigation and international duties to such an end." *Id.* at 407.

The *50 Foot Right of Way* case, *supra*, involved lands between high and low water mark over which a pipeline had been built during World War II, under war powers. The lands between high and low water are absolutely subject to federal control for navigational purposes, *United States v. Chicago, M. St. P. & P.R.R.*, 312 U.S. 592 (1941), but the pipeline taking had not recited, nor did the statutory authority refer to, the navigation power. The Third Circuit awarded compensation to the riparian owner of the lands between high and low water since



his title was limited only by the navigational servitude, which was not applicable.

The extent of the riparian owner's right in his lands was described in *Scranton v. Wheeler*, 179 U.S. 141, 163 (1900):

Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable river, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all time subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation.

There is no doubt that proper government exercise of the navigational servitude within the bed of the stream may cause real economic loss to a riparian owner. This is not taking within the meaning of the fifth amendment because the damage is consequential. Similarly government action within the bed of a stream, under its navigation power, may diminish riparian rights inherent in ownership of uplands or fast lands without the necessity for compensation because there has been no taking. See, *e.g.*, *United States v. Commodore Park*, 324 U.S. 386 (1945); *Greenleaf-Johnson Lumber Co. v. Garrison*, 237 U.S. 251 (1915); *Scranton v. Wheeler*, 179

U. S. 141 (1900); *Gibson v. United States*, 166 U.S. 269 (1897).

Each of those cases involved damage to uplands caused by navigational improvement within the bed of the stream. In both *Scranton* and *Gibson* the property of the riparian owner was made less valuable when the Government constructed docks and wharves which blocked convenient access from the uplands to the navigable waters. Greenleaf-Johnson Lumber Co. owned a dock which had been lawful, but was ordered destroyed without compensation when the harbor line was moved back. In *Commodore Park* material dredged from a bay was deposited in and across a small navigable stream which fronted the claimant's property. Residential property had its navigable water destroyed; this fresh tidal stream was turned into a stagnant pool, with consequent reduction in value of the land. But in each of the cases there was no taking, the injuries were consequential resulting from exercise of the navigational servitude *within* the navigable waters, and compensation was not constitutionally due.

As a result of this power over navigation, there is no private right in the *flow* of a stream—*i.e.*, in the water power inherent in the flow of the stream. *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913). There the power company had structures

required for its hydro-electric generating capacity located within the bed of the stream. The structures were ordered removed; the Court denied compensation for the value in energy of the flow of the St. Mary's River, in which they were located, or for the value of the structures themselves. In addition to the general principle of the navigable servitude which permitted this order of removal without compensation, the permits allowing the structures were expressly made revocable with or without cause by the Secretary of War.

*Chandler-Dunbar* was the leading case on the subject until *United States v. Twin City Power Co.*, 350 U.S. 222 (1956) was decided. The power company had assembled much of the land needed to construct a hydroelectric power project on the Savannah River. Permission of the Secretary of War and licenses from the Federal Power Commission had been obtained, but the licenses were allowed to lapse, and reinstatement was not sought until after the United States had determined to build the project itself. Compensation was sought and denied for the value of the uplands as a site for the dam. Justice Douglas, speaking for the Court, said:

It is argued however, that the special water-rights value should be awarded the owners of this land since it lies not in the bed of the river nor below high water but above and beyond the ordinary high-water mark. An effort is made by this argument to establish that this private land is not

burdened with the Government's servitude. The flaw in that reasoning is that the landowner here seeks a value in the *flow of the stream*, a value that inheres in the Government's servitude and one that under our decisions the Government can grant or withhold as it chooses. It is no answer to say that payment is sought only for location value of the fast lands. That special location value is due to the flow of the stream; and if the United States were required to pay the judgments below, it would be compensating the landowner for the increment of value added to the fast lands if the flow of the stream were taken into account.

That is illustrated by *United States v. Chandler-Dunbar Water Power Co.* [citation omitted], the case that controls this one.

350 U.S. at 225-26.

The next and most recent significant opinion by the Supreme Court in this area is *United States v. Virginia Elec. & Power Co. [Vepco]*, 365 U.S. 624 (1960). A flowage easement over fast lands which Vepco had acquired in anticipation of building a private dam was taken. The sole question was compensation; the easement was indisputably property. But the Government (and a dissent by Justices Whittaker and Black and Chief Justice Warren, 365 U.S. at 638) urged that the only value which this flowage easement had was in conjunction with a private exercise of a right to back up waters and flow them over the lands subject to the easement, a value which the Government had termi-

nated. The majority, however, found that the easement had “destructive value” in the rights which the easement gave Vepco as against the owner of the subservient fee. *Id.* at 630. The owner of the subservient fee had conveyed the fee to the government for \$1. The Court was obviously struck by the manifest injustice were the government’s position adopted: “[C]ompensation could be denied the fee owner because he had already conveyed the flowage easement [citation omitted], and denied the owner of the easement because it was valueless against condemnation by the United States. The Government would thus destroy the entire property interest in fast lands without compensation.” *Id.* at 631.

The dissent answered this by contending: “the law requires us to say: Exactly so.” *Id.* at 643.

*Twin City* was a strong re-affirmation of *Chandler-Dunbar*. But while that case denied value for water power, it granted location value to lands adjacent to the St. Mary’s River which were taken for lock and canal purposes. The *Twin City* dissent, 350 U.S. at 229 (four justices), cited particularly the lock and canal lands award in *Chandler-Dunbar*, concluding that the majority opinion “extend[s] the Government’s navigation servitude far above and beyond the high-water mark . . .” 350 U.S. at 245.

After reading the *Twin City* dissent, one writer has

concluded that the portion of *Chandler-Dunbar* dealing with value for lock and canal purposes was overruled *sub silentio* by the majority opinion. Fairman, *The Supreme Court, 1955 Term*, 70 HARV. L. REV. 83, 131, 132 (1956). But Fairman did not mention, and his conclusion does not seem to give any effect to, a footnote on canal and lock lands in the *Twin City* majority opinion. 350 U.S. at n. 1, 226. The *Twin City* footnote explained the lock and canal award:

It may be that the Court was influenced by the fact that, on the special facts of the case, the use of the land for canals and locks was wholly consistent with the dominant navigation servitude of the United States and indeed aided navigation. Whatever may be said for that phase of the case, it affords no support for respondent, since water-power value, held to be compensable by the Court of Appeals, was ruled to be non-compensable in the *Chandler-Dunbar* Case.

It is difficult, if not impossible, to distinguish the location value of lock and canal lands in *Chandler-Dunbar*, from the use of lands for a port site, which similarly is in aid of navigation. The definite exception for water power value, emphasized in the quoted footnote, is in accord with a statutory exception for water power value made in the Submerged Lands Act, 43 U.S.C. § 1301 (e) (1958), discussed in more detail below at 38-40 of this brief.



Fairman had this comment on *Twin City*:

The government's argument in these cases is plausible on its surface. The United States can deprive the land of its power site value without compensation by diverting the waters or refusing to permit the building of a dam. A subsequent condemnation would require payment only for the diminished value. It is then contended that the result should not be different if the condemnation is contemporaneous with the termination of the private opportunity. This argument disregards the traditional concept of a "taking" within the meaning of the fifth amendment. The destruction of the value in the first instance is not compensable because it is not such a taking; when the taking is later accomplished by condemnation, the value has already been reduced. But when both destruction of value and condemnation occur at the same time, the worth of the property is not diminished prior to the taking, and just compensation would seem to include the undiminished value.

Whatever the merits of the government's contention, the effect of these decisions is to extend the government's servitude in the flow of the stream so that the servitude includes the value which the presence of the flow imparts to adjoining property. This result was reached without discussion of the consequences which logically follow. The government's argument, for example, might require an irrigated farm to be valued as desert land. By permitting the government to base its argument on the hypothesis that it would exercise arbitrary power, the Court ignored the improbability of such arbitrary action, and the sanctions, both judicial and political, which may follow upon capricious destruction of property value.

70 HARV. L. REV. at 132.

Some inconsistency between *Twin City* and *Vepco* has been suggested. Bickel, *The Supreme Court, 1960 Term*, 75 HARV. L. REV. 41, 125 (1961). *Contra*, Note, *Compensable Value "Taking" of Dam Site*, 14 STAN. L. REV. 800, 804-06 (1962) (decisions reconciled with Holfeldian analysis of correlative rights and duties of owners of easement and fee). Bickel said:

In *Twin City* the Court relied on the fact that the government's decision to undertake the river project destroyed the power-site value of the land being condemned. If the effect of the government's intervention were to be taken into account in *Virginia Power*, the value of the easement would virtually disappear, for in the absence of some program for private power development, the easements would be saleable only to those who for some reason wished to obtain clear title to the subservient fee. Conversely, the *Virginia Power* reasoning, that the prospect of governmental intervention be discounted, suggests that some recognition should be given to the potential power-site value of the property. The Court's formula for appraising the value of the easement illustrates the inconsistency with the *Twin City* rationale. Adopting the formula laid down by the Fifth Circuit in *Augusta Power Co. v. United States* [278 F.2d 1 (5th Cir. 1960)] the Court held that the non-riparian value of the unencumbered fee must be apportioned between the easement holder and the owner of the fee, according to the probability of the easement's exercise; thus, as the likelihood of private development decreases, the value of the easement is reduced. In assessing this probability, the government's intervention, which makes the easement's exercise impossible, is to be disregarded. This formula recog-

nizes as compensable the value attributable to riparian uses because it explicitly takes into consideration the possibility of private use of the water. Once riparian values are recognized, there is no rational justification for restricting the maximum recovery to the non-riparian value of the property as was done in *Twin City*. But the reaffirmance of this maximum limit in *Virginia Power* suggests that the holding of *Twin City* will not be overruled.

However it is not necessary to question in the slightest degree the holdings in either *Twin City* or *Vepco* to see factual and legal distinctions between the private dam development there thwarted and the private port lands here taken which support full compensation for the taking of port site lands.

In the first place, the character of the use itself is physically different. The value inherent in a dam site is value which comes, as Justice Douglas observed, in the flow of waters. And as far as value for a dam site goes, power in the flow, the rate and quantity of water, is essential. Here there is nothing so tied to the fact of water moving with power past the lands taken. Admittedly water is necessary; indeed, water which is burdened with the navigation servitude is necessary for there to be port site value. But the existence of water is sufficient—it need not have the power which is needed for a dam site.

The *Twin City* and *Vepco* cases both involved lands which *could* be used for dams if all the land were assembled, if a federal license were granted, *if* many contingencies were satisfied. (It may be noted that at least some of the earlier cases, between *Chandler-Dunbar* and *Twin City*, denied compensation with language that talked of conjectural value because of the improbability that the use could be realized. See, *e.g.*, *United States ex rel. TVA v. Powelson*, 319 U.S. 266 [1943]; *Olson v. United States*, 292 U.S. 246 [1934].) But the lands here had present utility as a port site, at the time of taking. They have been used as a port site in the past, known as Castle Rock. Barge shipping has unloaded in past years on Appellants' lands.

The extent of federal power over power dam site developments is not the same as the power over port site development. Under the Federal Power Act, 16 U.S.C. §§ 791a-825r (1958), licenses are granted for a limited term, under specified conditions, with controlled rates, with preferences to states and municipalities, and may be denied altogether if the Federal Power Commission finds that the United States itself should construct the facility for which a private applicant has sought a license. See 16 U.S.C. §§ 799, 803, 812-13, 800 (a), 800 (b) (1958). The general tenor of the Act is to provide the rules for disposition and use of natural resources which the United States manages in an at least quasi-

proprietary capacity. The Supreme Court has said that the judgment of the Federal Power Commission can be upset only when that judgment has no basis in evidence and is devoid of reason. *United States ex rel. Chapman v. FPC*, 345 U.S. 153 (1953).

But the range of federal objection is restricted when the question is control of a private proposal to create a port. The object of control is to prevent obstruction to navigation. See 33 U.S.C. § 403 (1958). When harbor lines have been established by the Secretary of the Army under 33 U.S.C. § 404 (1958), section 403 permits a private person to build his wharves, docks, landings et cetera behind the harbor line. Only when there has been no harbor line established does section 403 require advance application to the Secretary of the Army for permission to build port facilities. This utilization by a property owner is a *right* subject only to the interests of navigation, accomplished by section 403. *United States v. River Rouge Improvement Co.*, 269 U.S. 411 (1926).

At issue in *River Rouge* was the valuation of lands taken for a navigation improvement, as reduced by the extent to which the value of the remaining property was increased by the improvement. The Court held that the charge to the jury was:

permeated by the fundamental error, emphasized



by the refusal of the requests, that the jury were left to determine the amount of the benefits to be deducted on the theory that a riparian owner on the improved river would have merely such uncertain and contingent "privileges" of access to the navigable stream and of constructing docks fronting on the harbor line, as the Government, in the exercise of an absolute control over the navigation of the river, might see fit to allow him, instead of being instructed that he would have a right to such access and the construction and maintenance of such docks until taken away by the Government in the due exercise of its power of control over navigation. And this error was the more serious since the plan of the improvement contemplated that the improved river should become a slip for docks and industries and recognized the right of a riparian owner to construct docks upon the harbor line; and there was nothing in the evidence indicating any probability that the Government would at any time abrogate or curtail this right in any respect.

\* \* \* The charge was not merely an over-emphasis of the contingent character of the rights of the riparian owners, but in substance an instruction that they had no rights in this respect, and could only obtain uncertain privileges, as a matter of grace. There is an essential difference between a substantial property right which may be enjoyed until taken away in the appropriate exercise of a paramount authority, and an uncertain and contingent privilege which may not be allowed at all.

269 U.S. at 420-21.

The Court said the United States had requested a charge (the refusal of which was error) that:



the jury be instructed, as bearing upon the existence and amount of the special benefits, that a riparian owner bordering on the new stream would have in respect thereto the usual rights of navigation pertinent to riparian property, that is, the right of access to the navigable part of the river in front of his property and the right to make a landing, dock or pier upon his harbor line, subject only to such general rules and regulations as the Government, in its power over navigation, might properly impose for the protection of the public right of navigation; that this power of the Government "over navigation for the protection of public rights can not be arbitrarily and capriciously exercised so as to destroy these riparian rights, but must be exercised with reasonable relations to the requirements of navigation . . . ."

269 U.S. at 417-18.

Thus the Government does not have the same power to restrict port site development that it has to limit the building of dams. To state it in terms of congressional intent, the statutes prohibit private dam development for a number of different reasons, including a finding that the Government itself should develop the dam. Port site development is barred only when it would constitute an obstruction to navigation.

The Supreme Court has compared the power of the Government over navigation to the power of state governments over the use of highways. "The beneficial use and hence the value of abutting property is decreased when a public street or canal is closed or obstructed by

public authority . . . but in such cases no private right is infringed." *Reichelderfer v. Quinn*, 287 U.S. 315, 319 (1932). The footnote (n. 3 at 319) compares the cases of *Gibson v. United States* and *Scranton v. Wheeler*, discussed at 14-15 of this brief and the raising of the level of the water, this reducing the power head at a private dam, was compared to the raising of a highway past a claimant's land—both noncompensable events. *United States v. Willow River Power Co.*, 324 U.S. 499, 510-11 (1945).

The application of a similar analogy here requires recovery of port site value although the Government could block access to the land or water highway, or could raise the level of the highway without compensation (other than for physical encroachment on the private lands). The taking of the property next to the highway without diminishing the value of the property requires compensation for the property according to its value as located next to the highway. Certainly the fact that the highway *could* be closed does not make the land worth only as much as land far from the highway. Rather the diminution in value if the highway were closed is discounted by the improbability of its happening to determine the value of the land. This approach is similar to the formula for valuing the easement held by Vepco, although the probability used there was that

of the exercise of the easement by the utility. 365 U.S. at 634-36.

There obviously is a point beyond which the Government may not use the navigational servitude to bar just compensation. One may imagine a condemnation of city industrial land in which it was contended that only the value of the land for residences, or even for stock grazing, need be paid because the city could zone the property to these restricted uses, and thus sever that portion of the present value which is attributable to industrial uses. Or similarly the federal government might seek to value irrigated land as desert land because the water could be cut off in the exercise of the navigational servitude. See Fairman, *The Supreme Court, 1955 Term*, 70 HARV. L. REV. 83, 133 (1956).

Almost bearing out Fairman's prediction, the Government contended that the practicability of irrigating lands could not be considered in a case involving other lands taken for this same John Day project. The court's oral order on the point allowed the irrigated value as the highest and best use to be shown, though the Judge tried to avoid the navigable servitude problem and relied in part on the different policy involved in western states' water, discussed at 36-37 of this brief. *United States v. Hess*, Civ. No. 63-289 (D. Ore. 1964) (Kilkenny J.), *appeal dismissed by stipulation*, No. 19763 (9th Cir. 1965).

See Appendix B of this Brief for the relevant portion of the transcript in that case, containing the judge's oral order at the pre-trial conference.

The examples seem absurd. They are absurd because such arbitrary action causing the diminution in value is highly improbable, and would be attended by sanctions, both judicial and political. Fairman, *supra*. The Government itself recognized this in its requested charge to the jury in *River Rouge*, quoted at 26 of this brief. The Government said that the navigation power cannot be "arbitrarily and capriciously exercised." The Supreme Court has interrelated the question of arbitrary action with property valuation in *United States ex rel. TVA v. Powelson*, 319 U.S. 266, 283-84 (1943). The question there presented was valuation of lands acquired for a private dam development, where all the necessary lands had not been acquired. To avoid the rule disallowing enhanced use value where the suggested use is highly unlikely, distant in the future, and involves assembling great quantities of land of which the particular condemnee only holds part, *Powellson* sought to set up the power of eminent domain held by him, to show acquisition of the needed lands was possible. The Court held the power to be a revocable privilege, for which the granting state need not pay if it revoked the license—and that therefore the federal government need not pay. The Court said:

It is suggested that this result would mean that in condemnation proceedings the United States need not pay the value of the property at the time of the taking if the state where the property is located might destroy or diminish that value through an appropriate exercise of its police power. It is manifest that such is not the case. A state may of course destroy or diminish values by an assertion of its police power without the necessity of making compensation for the loss. [Citations omitted.] While such a change will not be presumed (*United States v. River Rouge Improvement Co.*, 269 U.S. 411 [1925]), the possibility or probability of such action, so far as it affects present values, is a proper subject for consideration in valuing property for purposes of a condemnation award. [Citation omitted.] We do not disturb these general principles. The United States no more than a state can be excused from paying just compensation measured by the value of the property at the time of the taking merely because it could destroy that value by appropriate legislation or regulation. But we have here a unique situation. The power of eminent domain which respondent seeks to have reflected in the valuation is largely unexercised and need not be reflected in the measure of compensation if the state which conferred the privilege were the taker of the lands.

319 U.S. at 283-84.

So also should the land here be valued according to its highest and best use, as a port site, taking into consideration the possibility that legitimate government action will prevent port site development. The possibility here, of course, is about as slim as can be found: the Government disposed of the property by deed expressly



requiring a port to be developed on the tract which includes the lands here in question, and the State of Oregon's lease to the Boeing Company of the tract expressly gives the Boeing Company full riparian rights subject to various easements for minerals, utilities, grazing, et cetera. The possibility of destruction of port site value would thus appear to be virtually nil in the present case.

Persuasive additional reason for allowing port site value for the lands here in question comes from the general requirement that where part of a private parcel of land is condemned for any river or harbor improvement, the extent of benefit to the remaining portion of the parcel in private ownership from the improvement shall be taken to reduce the amount of compensation otherwise due for the lands taken. See 33 U.S.C. § 595 (1958). It was a provision to this effect which was at the heart of the *River Rouge Improvement Co.* case. The question there, and the position of the private party and the Government, were just the converse of the situation here. Land had been taken, there were benefits to the remaining land for improved utilization as a harbor, which was contemplated in the plans. The Government urged in language previously quoted in this brief that the benefits to the remaining land *for port purposes* were not speculative or uncertain, even in view of the navigational servitude.



The *River Rouge* Court recognized and cited *Chandler-Dunbar*. In navigational servitude cases, the Court has on occasion distinguished value in land as between private parties and value as between the government and a private owner. See, e.g., *Grand River Dam Auth. v. Grand-Hydro*, 335 U.S. 359, 373 (1948); *United States v. Willow River Power Co.*, 324 U.S. 499, 511 (1945). But in *River Rouge* it was as between the Government and the private owner that the private land was held to have additional value because of its suitability for port development.

Is it not only the language of the *River Rouge* opinion which supports Appellant's position, but also the injustice of a contrary holding. It would be a strange result which would allow the Government on one side to take what the landowner would otherwise get by virtue of an improved value, and at the same time deny this identical value, for port purposes, when it takes the land itself. This heads I win, tails you lose approach by the Government does not square with the fifth amendment requirement of just compensation.

The essence of the government's contention is that the fact that lands are located by a navigable stream cannot be taken into account. Our position is illustrated, in part, by *United States v. 2,477.79 Acres of Land*, 259 F.2d 23 (5th Cir. 1958). There the Government took

three parcels of land, two for the purpose of a dam and reservoir and one for the purpose of barracks. The court held that the award for the two tracts taken for the flood control project had to be reduced by the enhanced value of the third tract because of its location on the new reservoir. Then the third tract was valued more highly than the other two when taken for barracks purposes because it had extra value by way of the location on the new reservoir. This case combines the aspects of *River Rouge* and those of the present case. It shows that the rule of *River Rouge* works both ways: that location next to water enhances the value of land, and this may be taken to reduce a condemnation award where the land is taken for the purpose of the project which enhances the value; that compensation must be paid according to the enhanced value of the land by virtue of its waterfront location, even though the benefits of this location could (though not arbitrarily) be denied to the adjacent riparian owner. (The court understandably did not discuss the possibility that the benefits of the reservoir could be taken away, as by drainage or diversion, where the reservoir had just been built.)

The New York courts have considered the problem since *Twin City* (and, on appeal, since *Vepco*) and found that while flow value is to be excluded on condemnation, value by way of location next to water must

be paid. *Andrews v. State*, 19 Misc. 2d 217, 188 N.Y.S.2d 854 (Ct. Cl. 1959), *aff'd*, 11 App. Div. 2d 599, 200 N.Y.S.2d 451 (1960), *aff'd*, 9 N.Y.2d 606, 176 N.E.2d 42, 217 N.Y.S.2d 9, *cert. denied*, 368 U.S. 929 (1961). The Court of Claims said:

It follows therefore that consideration must be given to the location of this land and its contiguity to the river in arriving at its fair market value. We cannot regard the decisions in *United States v. Twin City Power Co.* [citation omitted] and *United States v. Chandler-Dunbar Water Power Co.* [citation omitted] as requiring a different result. The effect of these cases is to hold that where property is condemned for use as an integral part of the flow of the stream, condemnee is not entitled to the value of the property when so used, since it is entirely within the power of the Federal Government to determine all factors governing the flow of the stream. Thus, one part of the decision in *United States v. Chandler-Dunbar Water Power Co.* dealing with the island owned by St. Mary's Power Co. rejected any value arising from location as a necessary part of a comprehensive system of river improvement. On the other hand, in the same decision, the Court approved the finding of additional value in the strip of land owned by Chandler-Dunbar Water Power Co. arising from its availability and suitability for lock and canal purposes. It seems quite clear that the canal and lock use can only be carried out in an exercise of the sovereign's control over commerce and navigation, and yet the paramount right of the sovereign over the flow of the stream for these purposes would not permit the appropriation of that property without compensation for that aspect of its value.

19 Misc. 2d at 22, 188 N.Y.S.2d at 860.

Admittedly this was a state condemnation, but federal principles were involved. The only dilution in effect of the quoted analysis is in the suggestion which followed that a contrary interpretation might not be in accord with New York law.

It is obvious that the jury can not be blinded to the fact that condemned land is next to water. And its being next to water affects the uses for which it is put. The use of land for a sewer system is obviously related to riparian use, and to location of the land next to water. Yet the sewer system which was flooded by navigable waters raised behind a dam was held to have value apart from flow of the water, and not based solely on riparian use. *Borough of Ford City v. United States*, 213 F. Supp. 248 (W.D. Pa. 1963). It is obvious that location must have been a factor. A closed loop system running from nowhere to nowhere, without an outlet for discharge of effluent, would have no value at all. So if there is to be a system, and discharge, it must be into water, which requires some location next to water.

It should be re-emphasized at this point that the suitability of Appellant's lands for a port site is historically established—this is the site of the old Castle Rock landing. And the lands were well suited for a port site before John Day Dam was ever conceived. Further since the

entire parcel of Appellant's lands was taken, there is no question in the case of improvements to a privately held residue. This point only simplifies the case, and does not detract from the applicability of *River Rouge*, nor diminish the injustice of the government's position.

As the Court said in *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 337-38 (1893):

[A]fter taking this property, the Government will have the right to exact the same toll the Navigation Company has been receiving. It would seem strange that, if by asserting its right to take the property, the Government could strip it largely of its value, destroying all that value which comes from the receipt of tolls, and having taken the property at this reduced valuation, immediately possess and enjoy all the profits from the collection of the same tolls. In other words, by the contention this element of value exists before and after the taking, and disappears only during the very moment and process of taking. Surely, reasoning which leads to such a result must have some vice, at least the vice of injustice.

**B. Assuming power to deny compensation, policy is found in Acts of Congress which indicates that full compensation is to be paid.**

There is reason in the present case to find congressional intent to allow full compensation here, as there was in *United States v. Gerlach Livestock Co.*, 339 U.S. 725 (1950). There were two bases for the Court's decision there: the exercise of congressional power did not seem to have been premised on an intent to aid

navigation, and intent was found to procede under the Reclamation Act which had provided compensation for interests taken or disturbed without regard to whether the navigational servitude could be exercised to defeat compensation.

While there is no doubt that the purposes of the John Day Dam include aid to navigation, Congress has chosen to exert less than its full power in aid of navigation in projects in the western states, including Oregon. In its Declaration of Policy, 33 U.S.C. § 701-1 (b) (1958), the navigation power is stated to be limited in favor of uses of navigable waters for several other purposes, including industrial use. The reason behind this policy is doubtless the arid condition of much of the area to which it applies, west of the 98th parallel. The provision shows that at least in this regard, Congress has limited the use of the navigation servitude in the western states.

This difference in policy in the West is reinforced by part of the Submerged Lands Act, 43 U.S.C. § 1311 (e) (1958):

(e) Nothing in this chapter shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian, relating to the ownership and control of ground and surface waters; and the control, appropriation, use, and distribution of such waters shall



continue to be in accordance with the laws of such States.

The Submerged Lands Act is applicable to the navigable portion of the Columbia River which is involved in the present case, 43 U.S.C. § 1301 (a) (1958).

The general declaration of ownership in sub-section 1311 (a) independently lends weight to the Appellants' claim of port site value:

(a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States of the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

Congress had in mind the navigation power when the Submerged Lands Act was written; sub-section (a) is qualified by an exception for navigation in sub-section (d):

(d) Nothing in this chapter shall affect the use,

development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power;

This exception is re-stated in the positive in section 1314 (a), but this sub-section also contains additional reason for full compensation in the present case:

(a) The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, *but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands* and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 1311 of this title. [Emphasis supplied.]

The purpose of the act, as is well known, was to allow the states to make leases for mineral (primarily oil) exploration on the continental shelf under the sea. It is to this end in particular that section 1311 (a), above

quoted, confirmed title not only in the lands, but in the natural resources. And section 1301 (e) defines:

(e) The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life *but does not include water power or the use of water for the production of power.* [Emphasis supplied.]

Thus Congress has specifically treated the particular claims involved in both the *Twin City* and the *Vepco* cases, in a fashion which commands application of the maxim *expressio unius est exclusio alterius*. All natural resources — all available uses of the land — except for water power for the production of power belong to the riparian owner who is the grantee of the state. The act confirmed the right in the state's grantee to have the proprietary rights of development of the lands and natural resources. This is subject to the navigation power, a power which can not be arbitrarily and capriciously exercised so as to destroy riparian rights, but must be exercised with reasonable relation to the requirements of navigation. *United States v. River Rouge Improvement Co.*, 269 U.S. at 418.

We recognize that at this point in our analysis of the effect of the Submerged Lands Act that the essential question of the degree to which the navigational servi-

tude affects compensation must involve the same test of constitutional navigation power with which we dealt earlier in this brief. But the quoted portions of the Submerged Lands Act add force to Appellants' claim that there is a property right in the riparian owner's right to *develop* his lands for the economically and socially useful value as a port—a right which can be limited only when the attempted exercise of it tends to obstruct navigation (as for example a dock which extends past the harbor line) or when the power over navigation is otherwise properly exercised in a fashion which consequentially limits use of the property, and subject to the limit that the owner does not have the *right* to develop a power project.

In the present case there was no such limit on the riparian owner's rights in his lands. The question, as we earlier stated, is not whether the government conceivably *could* have made Appellants' lands less valuable without becoming constitutionally liable for compensation. It is established that no such action was ever taken. Rather we have an admitted taking of the lands and of the rights which attach to and inhere in the land to make use of the lands for a port, as the lands had been used in the past, in the Castle Rock Landing. The lands taken and the riparian right to use them for a port were then incorporated in a larger tract which was transferred to the State of Oregon for use as a port — a tract

which Oregon had already leased, in anticipation of acquisition, to the Boeing Company, a private corporation.

In conclusion,

The question presented is not whether the United States had the power to condemn and appropriate this property . . . for that is conceded, but how much it must pay as compensation therefore. Obviously, this question, as all others which run along the line of the extent of the protection the individual has under the Constitution against the demands of the government, is of importance; for in any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government. The first ten amendments to the Constitution, adopted as they were soon after the adoption of the Constitution, are in the nature of a bill of rights, and were adopted in order to quiet the apprehension of many that without some such declaration of rights the government would assume, and might be held to possess, the power to trespass upon those rights of persons and property which by the Declaration of Independence were affirmed to be unalienable rights.

\* \* \*

It in no wise detracts from the power of the public to take whatever may be necessary for its uses while, on the other hand, it prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.

*Monongahela Navigation Co. v. United States*, 148 U.S. 312, 324-25 (1893).

**II. Rule 71A of the Federal Rules of Civil Procedure does not stand alone to prescribe procedure for condemnation cases; the other Rules also apply, in particular, the Rules allowing extensions of time for excusable neglect.**

FED. R. CIV. PROC. 71A (a) specifically provides that the other Rules are applicable to condemnation proceedings except where Rule 71A otherwise provides. The only implication that this provision doesn't apply to the answer of the defendant is in Rule 71A (e) where it says the answer "shall" be filed within 20 days. On the other hand Rule 6 (b) allows enlargement of time after expiration of a specified period on a showing of excusable neglect. Rule 6(b) expressly excludes from its effect the Rules respecting Substitution of Parties, Motions for Directed Verdict, Amendment of Findings by the Court, Motions for New Trials of Amendment of Judgment, Relief from Mistake in Judgment, and Appeals to Circuit Courts. FED. R. CIV. PROC. 25, 50 (b), 52 (b), 59 (b), 60 (b), 61 (b), 62 (b), 63 (b), 64 (b), 65 (b), 66 (b), 67 (b), 68 (b), 69 (b), 70 (b), 71 (b), 72 (b), 73 (a) and (g), as detailed in Rule 6 (b). The obvious implication from this rather detailed list of situations in which the 6 (b) enlargement of time is not applicable is that 6 (b) does apply to proceedings under Rule 71A. The effect of the mandatory *shall* in 71A (e) must be taken to be no more than,



for example, the mandatory *shall* in Rule 12, providing in general for service of pleadings. And Rule 6(b) applies to ameliorate the word *shall* in Rule 12 (a).

It is unclear whether relief should be had in the present case under Rule 6 (b), or Rule 60 (b). The time from which the 20 day period of Rule 71A (e) runs is computed from the time of service of notice on the condemnnee. This obviously is after the Declaration of Taking. In the present case the Declaration was made August 13, 1963, and the Judgment on the Declaration was made August 14, before the expiration of the time within which the condemnnees could contest the validity of the taking. (R. at 22, 23.)

Rule 60 (b) allows relief from a final judgment, order or proceeding on the ground of excusable neglect, the same ground specified in 6 (b). 60 (b) specifies no exclusions from its effect in the fashion of Rule 6 (b). Thus whichever rule is applicable in the present case, the ground is the same, excusable neglect, and the same problem of integration with Rule 71A is presented.

In addition to the fact that neither Rule 6 (b) nor Rule 60 (b) contains any provision which indicates an intent that Rule 71A not be affected, Rule 71A contains its own provisions expressly excluding certain other of the Rules. Subsection (d) (3) (i) makes Rule 4 (f) inapplicable, and subsection (l) makes Rule 54 (d) inap-

applicable. Here there is an additional implication that these are the only exclusions, except perhaps where there may be direct conflict. But we have shown that there is no conflict between the general provisions allowing relief from excusable neglect and the provision for service of answer in Rule 71A.

In at least three instances, various District Courts have relaxed the severity of that portion of Rule 71A which requires defendants to serve an answer "within 20 days."

*In City of Davenport v. Three-Fifths of an Acre of Land*, 147 F. Supp. 794 (S.D. Ill. 1957), *aff'd*, 252 F.2d 354 (7th Cir. 1958), the court held that where defendants had erroneously filed a motion to dismiss instead of an answer that the motion to dismiss would be treated as an answer. The court said, in part:

It is quite possible that the defendant, not having answered within 20 days, has waived any objections or defenses to the taking of its property. However, the courts should and do construe the rules of civil procedure so as to work substantial justice in all cases and avoid a strict technical interpretation which might work a hardship on the litigants.

In *United States v. 1,108 Acres of Land*, 25 F.R.D. 205 (E.D.N.Y. 1960), the court held squarely that the provisions of Rule 60(b) were applicable to condemna-

tion proceedings brought under Rule 71A. However, in that particular case, the court also held that the defendants had failed to show the "excusable neglect" which would have brought them under the protection of Rule 60(b) and permitted a late filing.

In *United States v. 140.80 Acres of Land*, 32 F.R.D. 11, 14 (E.D. La. 1963), the Court, per Judge Ainsworth, likewise held that Rule 60(b) was applicable to proceedings brought under 71A although in that case there was also a failure on the part of defendants to demonstrate "excusable neglect."

Appellants have been able to find only one case in which a federal court has ruled that 71A proceedings must stand alone and that the court has no authority to relieve for excusable neglect. That case is *United States v. 7.724 Acres of Land*, 31 F.R.D. 290 (E.D. La. 1962) in which the court simply stated that Rule 6(b) is not applicable to 71A proceedings, citing no authority. Both the latter cases arose in the Eastern District of Louisiana; the latest case in point of time sustains the contention that the court has the authority to relieve the Appellants from excusable neglect.

Admittedly, excusable neglect has generally not been found when application has been made for relief. But this in no way detracts from the force of our argument here. We in this point seek simply to be allowed to

make a showing of excusable neglect; the District Court ruled it could not even be considered.

The answer which the defendants, Appellants here, would have filed, would have contested the validity of the taking by the federal government. In the first instance, the taking did not strictly comply with the requirement of 40 U.S.C. § 258a (1958) that a declaration of taking be filed "declaring that said lands are thereby taken for the use of the United States." While the Declaration of Taking did recite "The public use for which said property is taken . . ." (R. at 2) this failed to meet the statutory requirement. In particular, it must be noted that a "public use" is *not* the same as the use of the United States. Public use may be accomplished by any of the thousands of branches of government, most of them not part of the federal government, and even by some quasi-public bodies. Use of the United States is a different, more restrictive proposition, and, under the authority used, only lands for the use of the United States may be taken.

This taking, of course, is colored by the fact that while the Government is going to flow Appellant's lands with John Day Dam waters, the whole fee was taken, and the whole fee was immediately conveyed along with other properties to the State of Oregon. The State of Oregon had already, before acquiring the prop-

erty, leased it for a term of 75 years to a private, profit making company, the Boeing Company. Additionally, disposal of the lands for port use under 33 U.S.C. §578(b) (Supp. V 1964) is required to be at fair market value. This land which the Government sold for \$17,500 was already under lease, subject to acquisition, for \$60,000 per year. And that lease called not only for the port use contemplated in the disposal statute, 33 U.S.C. §578(a) (Supp. V 1964), but also general industrial use including private missile tests.

This type of government action is subject to review by the courts. *United States v. Agee*, 322 F.2d 139 (6th Cir. 1963). The recitals of the two preceding paragraphs of this Brief are not matters presented for review in this present appeal. Rather they are there presented to demonstrate the good faith of Appellants in seeking to be allowed to make an Answer to the condemnation proceeding, and to show that there are matters which should be properly presented in due course for the consideration of the courts.

The question of excusable neglect is one on which the District Court should have ruled. The case should be returned to the District Court to allow consideration of the merits of the excusable neglect urged by the Appellants. Rule 71A by its own terms provides that the

other rules are applicable, and this must be taken to include those rules providing for extensions of time.

### CONCLUSION

It is patent from the specific exclusions in the Rules of Civil Procedure, that the District Court was wrong in concluding that the provisions for extensions of time for excusable neglect were inapplicable to condemnation proceedings. The District Court should have ruled on the merits of the neglect which occurred, on the proper motion of the Appellants seeking to be allowed to file an Answer to the condemnation proceeding.

The District Court should have allowed Appellants to show, in accordance with the general law, the highest and best use of their lands, as a port site. This use, not speculative since the lands had been used as a port in the past, is subject to the navigation servitude to the extent that the Government properly acts within the bed of the stream in aid of navigation. But here nothing was done by the Government to diminish the value of this land. Rather the lands were taken for use as a port site, and port site value should be allowed the owners. The Supreme Court has held that as between the Government and the private owner, the riparian right to develop a port is a valuable property right. For this, constitutional just compensation must be paid. This conclusion is reinforced by the grant in the Submerged Lands



Act of the right to develop all natural resources excepting only power site development, and subject only to the navigation servitude. Here there was a taking of the lands at their full value. Full compensation must be allowed.

Wherefore Appellants respectfully pray that the judgments of the United States District Court for the District of Oregon be reversed, and the case remanded for a hearing on whether Appellants should be allowed to file an Answer, and for a new trial on the issue of just compensation, allowing evidence of port site value.

Respectfully submitted,

ALEX L. PARKS

LLOYD B. ERICSSON

DUSENBERY, MARTIN, BEATTY  
& PARKS

ROBERT B. ABRAMS

MAHONEY & ABRAMS

Counsel for Appellants

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ LLOYD B. ERICSSON

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**APPENDIX A**

Lease between the State of Oregon and The Boeing Co., of record in Morrow County, Oregon, Deed Book 70, pp. 241-74.

Appendices to this lease are omitted from this Appendix.

**LEASE**

This Lease made as of the 2nd day of July, 1963, by and between the State of Oregon, acting by and through the State Land Board, Lessor ("the State"), and The Boeing Company, a Delaware corporation, Lessee ("the Company"), witnesseth that:

**RECITALS**

A. Part of the lands described in Schedule A hereto ("the premises") now are owned by the State; part of the premises now are owned by the United States of America acting by and through the Department of the Navy ("Navy"); part of the premises now are owned by the United States of America acting by and through the Department of Interior ("Interior") and the Corps of Engineers ("the Corps").

B. Navy is empowered by Section 207 of Public Law 36-500, 74 Stat. 166, 175, The Reserve Forces Facilities Act of 1960, as amended by Public Law 87-356, 75 Stat.

777, to convey to the State Navy lands within the premises ("Navy lands") in exchange for the State's conveyance to Navy of other lands and facilities suitable for Navy purposes. A complete substitute facility has been provided and is available for use by Navy.

C. The Corps has authority and has taken steps to acquire the Interior lands within the premises and is empowered by Section 108 of Public Law 86-645, 74 Stat. 480, to convey to the State the Corps and Interior lands within the premises ("Corps lands") subject to a standard flowage easement and subject to reversion to the Corps in the event of non-use or substantial departure from an approved plan of development.

D. The State has been granted legislative authority to marshal and acquire Navy and Corps lands and has taken preliminary steps to acquire these lands.

E. Pending acquisition of the Navy and Corps lands, the State has obtained permission from Navy, Interior, and the Corps for the State and its lessees to go upon the Navy and Corps lands.

F. Upon acquiring the premises, and pursuant to legislative authority, the State proposes to lease the premises to the Company and the Company desires to rent the premises from the State upon the terms and conditions set forth hereinafter.

## CONDITIONS, COVENANTS AND AGREEMENTS

Now, therefore, in consideration of the premises and of the mutual covenants and agreements expressed hereinafter and for other good and valuable considerations, the parties hereto agree as follows:

## ARTICLE I.

CONDITIONS TO BE PERFORMED BY THE  
STATE PRIOR TO COMMENCEMENT OF THE  
COMPANY'S OBLIGATION TO PAY RENT

1. *First Condition.* Upon execution of this lease, the State, without expense to the Company, shall use its best efforts and shall do all things necessary promptly to acquire title to the premises subject only to the terms, conditions, reservations, exceptions and limitations set forth in Schedule B attached hereto and by this reference made a part hereof and, immediately upon so acquiring title thereto, shall cause to be delivered to the Company the following: (i) the unqualified written opinion of legal counsel selected by the Company that the State is authorized and empowered to enter into and to execute this lease and that this lease, when duly executed by the parties hereto and delivered, is and shall be the binding legal obligation of the State as lessor, in accordance with its terms; and (ii) the standard form of preliminary title insurance report and com-

mitment, issued by a title insurer acceptable to the Company, which shall commit said title insurer to issue to the Company its standard form of policy of title insurance containing only those terms, conditions, reservations, exceptions and limitations as are described in Schedule B hereto and insuring the Company's leasehold interest in the premises in the amount of \$100,000.00 upon the filing of this lease for record and payment by the Company of the premium therefor.

2. *Second Condition.* Within ten (10) days of its receipt of both of the documents aforementioned in paragraph 1 of this Article I, the Company shall notify the State in writing either that the State's title conforms to the stipulations of Schedule B or that the State's title is deficient because it does not conform to the stipulations of Schedule B. In the latter event, the Company's notice shall specify in what particular the State's title does not conform to the stipulations of Schedule B and the State shall have ninety (90) days from the date of its receipt of the Company's notice in which to correct the title defect specified in the Company's notice. If the defect specified in the Company's notice shall not have been corrected within the said ninety (90) days, this lease shall expire at the close of business in Seattle, Washington on the ninetieth (90th) day without further notice or action by either party hereto, unless the Company shall earlier have notified the State in writing

that it waives any defects remaining unremedied. When the defect shall have been corrected within the said ninety (90) days, the State shall cause to be delivered to the Company prior to the close of business in Seattle, Washington on the ninetieth (90th) day a supplementary preliminary title insurance report and commitment which shall conform to the stipulations of Schedule B, and thereafter, the procedures set forth in this Article I shall be followed with respect thereto as if it were the first preliminary title insurance report and commitment.

3. *The Company's Election if the State Should Fail to Perform First Condition.* If for any reason the Company should not have received both of the documents aforementioned in paragraph 1 of this Article I prior to noon, P.D.T. September 30, 1963, the Company shall have an election, exercisable by mailing written notice thereof to the State postmarked prior to midnight, October 15, 1963, either to terminate this lease forthwith or to waive the first condition. If the lease shall be so terminated, neither party hereto shall have any obligation whatsoever to the other party hereto under this instrument except that all sur-rental payments previously made pursuant to paragraph 2(a) of Article III hereof shall be returned to the Company pursuant to the escrow instructions set forth in Schedule D attached hereto, and the Company thereupon shall surrender



possession of the premises. If the Company should waive the first condition, it shall fix a date in 1963 by which the State shall perform it and, in the event of the State's subsequent or continued failure to perform the condition by the 1963 date so fixed, this lease shall expire at the close of business on the 1963 date so fixed without further notice or action by either party hereto and the State thereupon shall refund to the Company all sur-rental payments previously made pursuant to subparagraph 2(a) of Article III hereof and the Company thereupon shall surrender possession of the premises.

4. *Possession.* The Company shall be entitled to possession of the premises at the following times and on the following terms and conditions:

(a) Immediately upon execution of this lease, the Company shall pay the amount of sur-rental provided for in subparagraph 2(a) of Article III hereof and on and after July 2, 1963 shall have a license to enter the premises for survey and exploration purposes, including Navy, Interior and Corps lands, but subject, as to the latter, to the further conditions set forth in the Navy, Interior and Corps permits to enter, attached hereto as Schedule C.

(b) Within ten (10) days after receiving both of the documents aforementioned in paragraph 1 of this Article I, the Company shall pay to the State the

amount provided for in paragraph 3 of Article III hereof and thereupon shall be entitled to possession of the premises upon the terms and conditions set forth herein without regard to any limitations or conditions set forth in Schedule C.

## ARTICLE II.

### LEASE, TERM, EXPIRATION AND TERMINATION

1. *Lease.* Subject to the foregoing conditions, the State hereby leases to the Company and the Company hereby leases from the State the lands particularly described in Schedule A, subject only to the encumbrances, reservations, use restrictions and exceptions described in Schedule B, for the term and upon the terms and conditions set forth hereinafter.

2. *Term.* The term of this lease shall commence on the day on which, pursuant to subparagraph 4(b) of Article I of this lease, the State puts the Company in possession of the premises and, subject to earlier termination as provided for hereinafter, the said term shall expire at 11:59 P.M., December 31, 2040, A.M.

3. *Termination by the State.* The State, having cause or by reason of the Company's default remaining unremedied as provided hereinafter, may cause this lease to be terminated under the following circumstances and upon and subject to the following terms and conditions:

(a) *Failure to Put Premises to Proper Use.* If, at any time prior to December 31, 1970, the Company's use of the premises for industrial or for industrial research or developmental purposes shall have met the standard prescribed in paragraph 1 of Article IV hereof ("use test"), the State may not terminate this lease for the cause which is the subject of this subparagraph 3(a) of Article II and this subparagraph shall be of no force or effect whatsoever. If, as of December 31, 1970, the Company's use of the premises for industrial or for industrial research or developmental purposes in fact shall have failed to meet the use test, the State may take the following action leading to the termination of this lease on December 31, 1971. First, the State shall notify the Company not later than January 10, 1971, that in the State's judgment the Company's use of the premises fails to meet the use test. If said notice is not given on time, the State shall be deemed to have acknowledged that the Company's use of the premises conforms to the use test and to have waived irrevocably and to have abandoned permanently the State's right to terminate for this cause. After receipt of such notice, if, in fact the Company shall have failed to meet the use test, the Company shall have until June 30, 1971, in which to meet the use test and, if it shall have done so on or before the

latter date, the State's earlier notice shall have no force or effect and the term of this lease shall never again be subject to termination for this cause. If, on June 30, 1971, the Company's use of the premises still does not meet the use test, the State may notify the Company not later than July 10, 1971, that, pursuant to this lease provision, the lease shall be terminated by the State as of December 31, 1971, and if such notice is timely given, and if, in fact the Company shall have failed to meet the use test, this lease shall so terminate. If said notice is not given on time, the State shall be deemed to have acknowledged that the Company's use of the premises conforms to the use test and to have waived irrevocably and to have abandoned permanently the State's right to terminate for this cause.

(b) *Termination for Non-User.* If, after December 31, 1971, the premises are not used for any of the purposes specified in the use test for a period of twelve (12) consecutive calendar months, the State may take the following action which may lead to the State's unilateral termination of this lease. Within thirty (30) days of the last day of the twelfth (12th) consecutive month of non-user, the State may notify the Company: (i) of the fact of the Company's non-user for twelve (12) consecutive calendar months; (ii) of the terminal date of the period of non-user;

and (iii) that unless the premises are put to any of the uses specified in the use test within six (6) calendar months from the aforementioned termination date, the State shall terminate this lease pursuant to this provision on the last day of the sixth (6th) month. If the premises are so used within the time prescribed in said notice, the notice shall be of no force and effect and this lease shall not so terminate. If the premises are not so used within the time prescribed in said notice, this lease shall so terminate.

(c) *Default and Re-Entry — Termination for Cause.* The foregoing subsections 3(a) and (3)b do provide and shall be deemed to provide the exclusive means of termination by the State in the circumstances described therein. The provisions of this subparagraph 3(c) shall not be applicable to the circumstances described in subparagraphs 3(a) and 3(b) even though the 3(a) and 3(b) circumstances may involve a lease violation or default by the Company. If, within thirty (30) days after receiving notice of its violation of or its default in the performance of any covenant of this lease, the Company should fail or neglect to take steps to correct any such violation or default which in fact exists, then the State may terminate this lease by re-entering the premises at the expiration of the thirty (30) day period. In the event that the State should re-enter

under the foregoing provision of this lease, the Company's liability for rent to become due thereafter shall be extinguished.

4. *Termination by the Company.* The Company may terminate this lease under the following circumstances and upon and subject to the following terms and conditions:

(a) *For Breach of the State's Covenant of Quiet Enjoyment.* The State covenants that so long as the Company performs the covenants by it to be performed hereunder the Company shall have quiet and peaceful possession, use and enjoyment of the premises. If the Company's quiet and peaceful possession, use and enjoyment of the premises should be breached in any manner or degree, the Company may give the State written notice thereof and, if the State should fail, neglect or be unable to terminate and correct the breach of the Company's quiet enjoyment within ninety (90) days of its receipt of said notice, the Company may cause termination of this lease by giving the State written notice of termination and, in the latter event, termination shall occur without further action by either party at the close of business on the one hundred eightieth (180th) day following the giving of said termination notice. This remedy shall be in addition to any and all



other remedies which the Company may enjoy either at law or in equity. Except as otherwise provided herein, exercise by any party entitled to the benefit thereof of any of the reservations or exceptions set forth in Schedule B shall not constitute breach by the State of the foregoing covenant of quiet and peaceful possession, use and enjoyment of the premises.

(b) *Condemnation.* If any eminent domain proceedings are instituted under which all or any portion of the premises may be taken by exercise of the power of eminent domain, and if, in the Company's absolute and uncontrolled judgment and discretion, the threatened taking will materially interfere with, hinder, embarrass or inconvenience the Company's use or intended use of the premises, the Company may terminate this lease by giving the State appropriate written notice on or before the one hundred twentieth (120th) day following the institution of such eminent domain proceedings. Termination shall occur either on the date that lawful possession is taken by the condemnor or one hundred eighty (180) days following the giving of the notice of termination, whichever is the later date.

(c) *The Company's Right to Terminate Without Cause.* In addition to the termination rights the Com-

pany may exercise pursuant to Article I hereof and pursuant to the subparagraphs of this paragraph 4 of this Article II, the Company, without cause or default by the State, unilaterally may cause this lease to be terminated as at 11:59 P.M., December 31, in the years 1970, 1980, 1990, 2000, 2010, 2020, or 2030, A.D. The Company's right so to terminate shall be exercisable by giving the State written notice of the Company's election to terminate not later than January 1 of the same year in which such termination is to become effective.

5. *Removal of Property on Expiration and Termination.* At any time during the term of this lease or upon its expiration or in the event of any termination or of any re-entry, the Company shall have the right but not the obligation to dismantle all of its fixtures and properties, real, personal and mixed that may be located in or upon the premises and to remove them therefrom. In any situation in which termination or re-entry shall have occurred less than one hundred eighty (180) days from the date on which the Company was notified of the impending termination, the Company shall have not less than one hundred eighty (180) days after receipt of such notice or of such a re-entry in which to complete its dismantling and removal operations.

6. *Surrender of Possession.* The Company shall sur-

render possession of the premises upon expiration of the lease and upon completion of dismantling and removing its properties in the event of a prior termination or re-entry and shall leave the premises in as good condition as existed at the time of its taking possession thereof; expectable changes attributable to the Company's use of the land and changes caused by the elements and other causes beyond the Company's control being excepted from the foregoing covenant.

7. *Exercise of Reserved Mineral Rights.* The State shall at all times protect and defend the Company's right to carry out its intended or desired use of the premises from any and all claims of parties claiming right to use of the premises or a portion thereof by reason of reservation in them or their predecessors in title or interest of oil, gas, or minerals or the right to explore for or to exploit such oil, gas, or minerals. In cases where the State may be entitled or is bound to grant permission for such exploration or exploitation, such permission shall not be given by the State without the Company's prior written consent approving the terms, conditions, time of beginning, duration and geographical extent of such permission. The State's failure to perform any of its obligations under this paragraph 7 shall constitute a breach of the covenant of quiet and peaceful possession, use and enjoyment of the premises pursuant to subparagraph 4(a) of this Article II.

8. *Grazing and Agricultural Rights and Leases.* Notwithstanding any other provisions of this lease or of Schedule B, the State hereby covenants and agrees as follows:

(a) The State shall defend and hold harmless the Company, its successors, assigns and sublessees and the officers, agents, employees, contractors, sub-contractors, lessees, sublessees, licensees, permittees, successors and assigns of any of them from any and all claims for loss, cost or damages of any nature and from whatever source suffered or incurred by virtue of the exercise by any party or parties of their rights under any reservation of grazing or agricultural rights or any grazing or agricultural leases in effect at the time the Company is given possession of the premises pursuant to subparagraph 4(b) of Article II hereinabove.

(b) The State shall grant no grazing or agricultural rights, permits or leases or permit any extensions, renewals or modifications of existing grazing or agricultural rights, permits or leases without the prior written consent of the Company approving the terms, conditions, time of beginning, duration, and geographical extent thereof. In the event any such grazing or agricultural rights, permits or leases shall

be granted, all consideration therefor shall be paid to the Company.

(c) The State's failure to perform any of its obligations under this paragraph 8 shall constitute a breach of the covenant of quiet and peaceful possession, use and enjoyment of the premises pursuant to subparagraph 4(a) of this Article II.

### ARTICLE III.

#### RENT

1. *Basic Rental.* Except as hereinafter provided in this Article III, the Company shall pay quarterly rental of Fifteen Thousand Dollars (\$15,000.00) in advance not later than the fifteenth (15th) day of January, April, July and October of each year of the lease term. The payment provided for in subparagraph 2(a) of this Article III shall be made to the United States National Bank of Portland, Oregon, in escrow, pursuant to escrow instructions set forth in Schedule D attached hereto and by this reference made a part hereof. Initially, all other payments shall be made by mail to the order of the Oregon State Treasurer at his office in Salem, Oregon. At any time and from time to time the State may designate an alternate method of payment delivery or an alternate place of payment or both.

2. *Sub-Rental.* In addition to the basic rental pro-

vided by paragraph I of this Article III, the Company shall pay to the State a sur-rental equal to (i) the State's cost of removing Navy from the premises and providing a substitute facility for Navy's use, or (ii) Seventy-five Thousand Dollars (\$75,000.00), whichever is smaller. The total sur-rental thus determined shall be payable as follows:

(a) *1963 Sur-Rental.* Upon execution of this lease, the Company shall pay in escrow, as provided in Schedule D attached hereto, a sur-rental payment of Thirty-five Thousand Dollars (\$35,000.00).

(b) *Sur-Rental Payments for the Years 1964 Through 1969.* Commencing January, 1964, and continuing through October, 1969, the Company shall pay in advance, at the times and in the manner that basic rental is paid pursuant to paragraph 1 of this Article III, quarterly sur-rental equal to one-twentieth ( $1/20$ th) of the difference between the total sur-rental as determined by this paragraph 2 and the 1963 sur-rental payment provided for in subparagraph 2(a) of this Article III.

3. *Basic Rental for 1963.* If the Company is given possession of the premises in 1963 pursuant to subparagraph 4(b) of Article I hereinabove, the basic annual rental for 1963 of Sixty Thousand Dollars (\$60,000.00) shall be prorated according to the number of days of



such possession. The latter amount, thus prorated, shall be the sum which the Company shall be required to pay pursuant to subparagraph 4(b) of Article I hereinabove.

4. *Basic Rental Adjustment.* The basic rental provided for in paragraph 1 of this Article III shall be and shall remain effective only until December 31, 1969. In order to cause the basic rental to conform to major trends in the changing purchasing price of the dollar, the dollar amount of the basic rental shall be adjusted in 1969 and every ten (10) years thereafter. The new basic rental, as thus adjusted ("adjusted basic rental"), shall become effective on January 1 of the years 1970, 1980, 1990, 2000, 2010, 2020 and 2030 A.D., respectively, ("adjustment dates"), and the adjusted basic rental becoming effective as of any adjustment date shall remain effective until the next following adjustment date or until expiration or earlier termination of this lease. The annual adjusted basic rental for any 10-year period shall be the amount which bears the same ratio to Sixty Thousand Dollars (\$60,000.00) as: (i) The Wholesale Price Index (all commodities) published by the United States Labor Department's Bureau of Labor Statistics for the month of March in the year immediately preceding any adjustment date bears to (ii) the said same index for the calendar month in which the Company initially takes possession of the premises pursuant to subparagraph 4(b) of Article I

hereinabove. If said Wholesale Price Index is discontinued, the State and the Company shall select as nearly comparable statistics, reflecting the purchasing power of the dollar in the hands of a consumer purchasing commodities at wholesale, as then may be published in some responsible financial periodical of recognized authority or is then otherwise available, and such statistics shall be used thereafter in lieu of said Wholesale Price Index in determining the adjusted basic rental. If, prior to the next succeeding adjustment date, the parties hereto are unable to agree upon the statistics to be used in lieu of the discontinued Wholesale Price Index, selection of the substitute statistics shall be made by such third party as the parties hereto may agree upon, or in the absence of agreement, shall be made by such third party as may be chosen by the then presiding judge of the United States Court of Appeals for the Circuit encompassing the State of Oregon on application of either party upon notice to the other party.

5. *Rental on Additional Lands.* If at any time or from time to time in the future the State should acquire by purchase, lease, federal surplus procedures, or otherwise, any federal lands, or, for industrial purposes, any other lands contiguous to the premises covered by this lease, which at the time of their acquisition by the State are not within the premises then being leased to the Company, the State shall give the Company written

notice of its acquisition of said additional lands. For sixty (60) days after its receipt of said written notice, the Company shall have the right to cause all or any part of the additional lands, so acquired by the State, to be made subject to this lease. The basic rental per acre per quarter on any such additional land after it becomes subject to this lease shall be the basic rental per acre per quarter paid on the land subject to the lease on the first day of the quarter immediately preceding that quarter in which the additional land becomes subject to this lease.

6. *Sub-Rentals.* The Company shall pay to the State on or before the 15th day of January of each calendar year, an amount to 50% of the Company's gross cash receipts as sub-rental during the immediately preceding calendar year with respect to any portion of the premises which the Company has sub-let pursuant to paragraph 2 of Article IV hereof; provided, however, that the State shall not be entitled to any sub-rental payments hereunder until the Company shall first have recovered from sub-rentals an amount equal to the total sur-rental payment pursuant to paragraph 2 of this Article III; and provided, further, that the State shall not be entitled to any sub-rental payments in any calendar year until the Company shall have first recovered from sub-rentals, an amount equal to the annual adjusted basic rental for that year. In determining the amount

of the Company's gross cash receipts as sub-rental, there shall be considered only such amounts as are actually received by the Company as cash payments for sub-rental attributed to the bare land, excluding all improvements, over which the sub-tenant has been given exclusive possession and control.

#### ARTICLE IV.

##### POSSESSORY USE, RIGHTS AND OBLIGATIONS

1. *Use Test.* Subject to the following terms, conditions and qualifications the Company shall make use of the premises primarily for industrial or industrial research or developmental purposes. Failure to do so shall subject the Company to the risk of the State's termination of this lease pursuant to the provisions of paragraph 3(a) of Article II hereof; provided, however, that the Company's use of the premises shall be and shall be deemed to be primarily for industrial or industrial research and developmental purposes, and this lease shall not be subject to termination by the State pursuant to paragraph 3(a) of Article II hereof if:

(a) The Company's primary industrial or industrial research and developmental effort is concentrated in only a part or parts of the entire premises;

(b) While the Company's primary industrial or

industrial research or developmental effort is concentrated in a part or parts of the premises, another part or other parts of the premises are put to non-industrial use by (i) a party entitled to enjoy the rights, reservations, use restrictions or exceptions set forth in Schedule B hereto; or (ii) by the Company; or (iii) by those in possession of the premises by its consent. For example, if, while the Company's primary industrial or industrial research developmental effort is concentrated in one part or parts of the premises, the Company, to minimize fire hazard or to accommodate neighboring grazing or agricultural interests, should permit sheep to graze and agriculture to be practiced on another part or other parts of the premises, this lease shall not be subject to termination by the State pursuant to paragraph 3(a) of Article II hereof. Similarly, if, while the Company concentrated its primary industrial or industrial research or developmental effort in one part or parts of the premises, the Company should deem it desirable to construct housing or some related facility for the accommodation of personnel involved in the industrial or industrial research or developmental effort or in secondary efforts related thereto, the Company may permit the construction of such housing or other facilities without being subject to

termination of this lease pursuant to paragraph 3(a) of Article II hereof.

2. *Subletting and Assignments.* This lease shall not be assignable by the Company and the Company shall not sublet more than one-half ( $\frac{1}{2}$ ) of the premises without the State's prior written consent, which shall not be withheld unreasonably; provided, however, that without the State's consent, the Company may assign this lease to the United States or to any agency or instrumentality thereof and the Company may sublet up to and including one-half ( $\frac{1}{2}$ ) of the premises. Transfer of this lease from the Company to another party by merger, consolidation or liquidation and change in the ownership of or power to vote the majority of the Company's outstanding voting stock shall not be deemed to constitute an assignment for the purposes of this paragraph. The granting of leases or other interests in the premises permitting grazing or agricultural uses of the premises or a portion thereof shall not constitute an assignment or a subletting for the purposes of this paragraph.

3. *Use by Subtenants.* Subtenants may use the premises for any lawful purpose, and industrial use or industrial research or developmental use by a subtenant shall be deemed to be the Company's use for the purposes of paragraph 3(a) of Article II and paragraph 1 of this Article IV hereof.



4. *Liens.* The Company shall keep the premises free from any liens arising out of work performed, materials furnished or obligations incurred by or for the Company.

5. *Taxes.* For all purposes of this lease the terms "tax" and "taxes" shall refer only to those taxes, excises, duties, fees, assessments and charges which lawfully are levied or an imposed by the State of Oregon or by any lawfully created municipal corporation, taxing district, improvement district, agency, institution, department or political subdivision of state or local government, which becomes a lien upon the premises after the date on which the Company takes possession thereof and which becomes due and payable prior to the date on which, by virtue of expiration or prior termination of this lease, the Company surrenders possession thereof. The Company shall pay or shall cause to be paid when due all taxes, as thus defined, provided, however, that the Company may deduct from rental payments due to the State hereunder during any calendar year any and all taxes payable during such calendar year based upon, incident to or measured by either: (i) the bare land value of the premises; or (ii) the value of this leasehold interest as intangible personal property; or (iii) both (i) and (ii) above.

6. *Condemnation—Reduced Rental and Division of Award.* If the Company elects not to terminate pursuant

to subparagraph 4(b) of Article II hereof, the basic rental payable hereunder on and after the date lawful possession is taken by condemnor shall be reduced by the amount of rental which is proportionate to the area so taken. Any award made in eminent domain proceedings involving the premises shall be distributed as between the State and the Company as follows: (i) the State shall receive all sums, if any, awarded as compensation for the taking of the bare land exclusive of improvements thereon; and (ii) the Company shall receive all sums awarded as compensation for the taking of the Company's leasehold interest and for the taking of the Company's improvements, including, without limiting the generality of the foregoing, all site preparation, grading, subgrading and filling and buildings, installations, facilities, attachments, fixtures, additions and appurtenances.

7. *Navy Contract.* The State covenants that it will perform its obligations pursuant to its contract with Navy for the purchase of Navy lands within the premises and will not permit any impairment or forfeiture of its interest thereunder. Documentary evidence of satisfaction of each of such obligations shall be promptly supplied to the Company upon its request. Failure of the State to satisfy any such obligation or to supply such evidence shall be deemed to be a breach of the State's covenant of quiet and peaceful possession, use and en-

joyment of the premises pursuant to subparagraph 4(a) of Article II hereabove. Notwithstanding the foregoing, the Company shall have the right, but not the obligation, to take whatever action may be required to remedy any default by the State in its obligations to the Navy pursuant to said contract, including but not limited to the payment of moneys owed by the State to Navy. The entire cost of any such action by the Company shall be offset against any rental or sur-rental payments then due or thereafter to become due to the State pursuant to Article III hereof.

8. *Waterfront Property.* The parties hereto recognize that the State's title to the waterfront property within the premises is subject to certain conditions and use restrictions as set forth in Schedule B. Notwithstanding this, the Company shall have unrestricted use of the waterfront property and full riparian rights in conjunction therewith, and the State shall exercise every effort to secure, preserve and protect such rights. The State's failure to perform its obligations pursuant to this paragraph 8, or any interference, of any nature and from whatever source, with the Company's intended or desired industrial use or development of the waterfront property, whether or not such intended or desired industrial use or development is consistent with an approved plan of development, shall constitute a breach of the State's covenant of quiet and peaceful possession,

use and enjoyment pursuant to subparagraph 4(a) of Article II hereinabove. The State's obligation with respect to waterfront property shall include but not be limited to the following:

(a) The State shall use every effort to secure approval by the Corps, or its successors in interest, of any proposed plan or amendment to existing plans for development or use of the waterfront property which may be requested by the Company.

(b) The State shall use every effort to acquire and make application for any additional waterfront property contiguous with or adjacent to the premises which the Company may require or desire for use or development for industrial or port facilities in conjunction with the use of the premises by the Company or its subtenants.

(c) The State shall use every effort to acquire and make application for any and all additional waterfront property contiguous with or adjacent to the premises which are or may become available pursuant to Section 108 of Public Law 86-645, 74 Stat. 480, or any other or similar legislation presently in force or hereafter enacted.

## ARTICLE V.

## ADMINISTRATIVE PROVISIONS

1. *Notice.* Any notice required to be given by either party to the other pursuant to the terms of this lease shall be sufficiently given if made in writing and mailed by registered or certified mail, postage prepaid, at any post office either in the State of Oregon or in the State of Washington and addressed to the Company at Post Office Box 3707, Seattle 24, Washington, Attention: Director of Facilities, and addressed to the Governor, Salem, Oregon, or to such other address as either party at any time and from time to time unilaterally may designate in writing. Any notice required to be given hereunder shall be deemed to have been given on the next regular business day following such mailing by registered or certified mail, postage prepaid.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed and their respective seals to be affixed hereto by their duty authorized and empowered officers this 1st day of July, 1963.

THE STATE OF OREGON  
By The State Land Board

(Seal)

By Mark Hatfield  
Governor

By Howell Appling  
Secretary of State

By Howard C. Belton  
State Treasurer

THE BOEING COMPANY  
By William M. Allen

(Seal)

H. O. Cake

STATE OF WASHINGTON )  
 ) ss.  
COUNTY OF KING )

On this 1st day of July, 1963, before me the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared William M. Allen, to me known to be the President of THE BOEING COMPANY, the corporation that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes herein mentioned, and on oath stated that he is authorized to execute the said instrument and that the seal affixed is the corporate seal of said corporation.

WITNESS my hand and official seal hereto affixed the day and year in this certificate above written.

Harry L. Blangy Jr.

(Seal)

Notary Public in and for the State  
of Washington, residing at Seattle.



## Schedule "A"

The following described property in Morrow County,  
Oregon:

In Township 2 North, Range 23 East of the Willamette Meridian:

All of Sections 1, 2, 3, 4, 5, 9, 10, 11, 12, 13, 14, 15, 22, 23 and 24.

In Section 6:

The Southeast Quarter of the Northwest Quarter ( $SE\frac{1}{4} NW\frac{1}{4}$ ), the South Half of the Northeast Quarter ( $S\frac{1}{2} NE\frac{1}{4}$ ), the Northeast Quarter of the Southeast Quarter ( $NE\frac{1}{4} SE\frac{1}{4}$ ), and Government Lots 1, 2, 3, 4 and 5.

In Section 8:

The Northeast Quarter ( $NE\frac{1}{4}$ ), the North Half of the Northwest Quarter ( $N\frac{1}{2} NW\frac{1}{4}$ ), and the East Half of the Southeast Quarter ( $E\frac{1}{2} SE\frac{1}{4}$ ).

In Section 16:

All of that portion of said Section 16 which lies easterly of State Highway No. 74 as it is now situated, save and except the following described tract of land.

Starting from a point on the East Boundary line of the right of way of State Highway No. 74 as it is now situated 400 feet North and 400 feet East of the Southwest corner of said Section 16, thence due East 400 feet thence due North 600 feet, thence due West to the East boundary line of the right of way of State Highway No. 74, thence South along the East boundary line of the right of way of State Highway No. 74 to the place of begin-

ning; all of said tract being located in the Southwest Quarter of the Southwest Quarter (SW- $\frac{1}{4}$  SW- $\frac{1}{4}$ ) of said Section 16.

**In Section 21:**

All of that portion of said Section 21 which lies Easterly of State Highway No. 74 as it is now situated, save and except the following described tract of land:

Starting from a point on the East boundary line of the right of way of State Highway No. 74 as it is now situated 1200 feet South and 300 feet East of the Northwest corner of said Section 21, thence due East 500 feet, thence due South 500 feet, thence due West to the East boundary line of the right of way of State Highway No. 74, thence North along said East boundary line of State Highway No. 74, to the place of beginning; all of said tract being located in the West Half of the Northwest Quarter (W- $\frac{1}{2}$  NW- $\frac{1}{4}$ ) of said Section 21.

**In Township 3 North, Range 23 East of the Willamette Meridian:**

All of Sections 1 through 36, inclusive.

**In Township 4 North, Range 23 East of the Willamette Meridian:**

All of fractional Sections 13, 14, 22 and 23 and the East Half (E- $\frac{1}{2}$ ) and the East Half of the West Half (E- $\frac{1}{2}$  W- $\frac{1}{2}$ ) of fractional Section 21, and all of Section 24, except the relocated rights of way for Oregon-Washington Railway and Navigation Company (Union Pacific Railroad) and for relocated United States Highway No. 30.

All of that portion of Section 20, 30 and the West Half of the West Half (W- $\frac{1}{2}$  W- $\frac{1}{2}$ ) of Section 21 lying Southerly of the right of way for relocated United States Highway No. 30.

All of fractional Section 15.

All of Sections 25, 26, 27, 28, 29, 31, 31, 33, 34, 35 and 36.

In Township 2 North, Range 24 East of the Willamette Meridian:

All of Sections 1 through 24, inclusive.

In Township 3 North, Range 24 East of the Willamette Meridian:

All of Sections 1 through 36, inclusive.

In Township 4 North, Range 24 East of the Willamette Meridian:

All of fractional Sections 7, 8, 9 and 10.

All of fractional Sections 15, 16, 17 and 18 except the relocated rights of way for Oregon Washington Railway and Navigation Company (Union Pacific Railroad) and for relocated United States Highway No. 30.

All of Sections 19, 20, 22, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36.

The South Half (S- $\frac{1}{2}$ ) of Section 25.

The South Half (S- $\frac{1}{2}$ ) of Section 26.

The following described property in Gilliam County, Oregon:

In Township 3 North, Range 22 East of the Willamette Meridian:

In Section 1:

All of that portion of the East Half (E- $\frac{1}{2}$ ) of said Section 1 which lies Easterly of the State Highway No. 74 as it is now situated.

In Section 12:

The East Half of the East Half ( $E-\frac{1}{2} E-\frac{1}{2}$ ) of said Section 12.

All of Sections 24 and 25.

In Section 26:

The Northeast Quarter of the Northwest Quarter ( $NE-\frac{1}{4} NW-\frac{1}{4}$ ) and the East Half of the East Half ( $E-\frac{1}{2} E-\frac{1}{2}$ ) of said Section 26.

In Section 35:

All of that portion of the East Half of the Northeast Quarter ( $E-\frac{1}{2} NE\frac{1}{4}$ ) of said Section 35 which lies Easterly of State Highway No. 74 as it is now situated.

In Section 36:

All of that portion of the North Half ( $N-\frac{1}{2}$ ), the North Half of the South Half ( $N-\frac{1}{2} S-\frac{1}{2}$ ) and the South Half of the Southeast Quarter ( $S-\frac{1}{2} SE\frac{1}{4}$ ) of said Section 36 which lies Easterly of State Highway No. 74 as it is now situated.

In Township 4 North, Range 22 East of the Willamette Meridian:

In Section 25:

All of that portion of said Section 25 lying Easterly of State Highway No. 74 as it is now situated and lying Southerly of the right of way for relocated United States Highway No. 30.

In Section 36:

All of that portion of the East Half ( $E-\frac{1}{2}$ ) and the East Half of the Northwest Quarter ( $E-\frac{1}{2} NW-\frac{1}{4}$ ) of said Section 36 lying Easterly of State Highway No. 74 as it is now situated.

## SUPPLEMENT TO LEASE

THIS AGREEMENT, Made as of the 13th day of December, 1963, as a supplement to that certain Lease ("the Lease") dated July 2, 1963, wherein THE BOEING COMPANY, a Delaware corporation, as Lessee, leased from the STATE OF OREGON, acting by and through its State Land Board, as Lessor, certain lands described in Schedule A annexed to the Lease, in Gilliam and Morrow counties, Oregon, known as the Boardman Space Age Industrial Park, witnesseth that:

## RECITALS

A. The State has now acquired title to the premises described in the Lease.

B. The condition of the State's title does not conform in all respects with the provisions of Schedule B of the Lease.

C. Administrative control of the premises covered by the Lease has been transferred to the Director of Veterans' Affairs of the State of Oregon by Oregon Laws, 1963, Special Session, Chapter 7.

## COVENANTS AND AGREEMENTS

NOW, THEREFORE, in consideration of the premises and of the mutual covenants and agreements ex-

pressed hereinafter and for other good and valuable considerations, The Boeing Company ("the Company") and the State of Oregon, acting by and through its Director of Veterans' Affairs ("the State") agree as follows:

1. *Revised Schedule B.* Revised Schedule B dated December 13, 1963 ("Revised Schedule B"), and attached hereto, is hereby substituted for the original Schedule B attached to the Lease, and wherever the term "Schedule B" is used in the Lease it shall be deemed to refer to Revised Schedule B.

2. *Covenants by the State.* Notwithstanding the inclusion in Revised Schedule B of the exceptions and reservations set forth in this paragraph 2, and regardless of whether or not the Company accepts possession of the premises with knowledge of such exceptions and reservations, the State hereby covenants as follows:

(a) The State will use its best efforts to acquire the mineral rights reserved by the United States of America, set forth in paragraph A of Article VIII of Revised Schedule B.

(b) In the event the Company notifies the State that the exercise of the rights, reserved by the United States of America, acting by and through the Secretary of the Army, to clear, borrow, exca-



vate and remove rocks, soil and other similar materials, said reserved rights being more particularly described in paragraph B of Article VII of Revised Schedule B, interferes or threatens to interfere with the Company's use or intended or desired use of the premises, the State shall use its best efforts to make available to the United States of America a satisfactory substitute source of rock, soil or other materials and to acquire from the United States of America the reserved rights which are the subject of this paragraph (b).

(c) As soon as the United States of America acquires title to the present right of way of the Oregon-Washington Railroad & Navigation Company (Union Pacific Railroad) on the leased premises, the State shall acquire said right of way.

Failure of the State to perform its obligations pursuant to this paragraph 2 shall constitute a breach of the State's covenant of quiet and peaceful possession, use and enjoyment pursuant to subparagraph 4(a) of Article II of the Lease.

3. If the title insurance report and commitment provided to the Company pursuant to paragraph 1 of Article I of the Lease contains an exception limiting the obligation of the title insurer for costs, attorneys' fees and expenses of litigation commenced on or before De-

cember 1, 1968, to contest or establish the constitutionality or legality of the laws under which the Lease was entered into and the validity of the Lease, the Company may deduct from rental payments becoming due to the State under the Lease all reasonable costs, attorneys' fees and expenses incurred by or for the account of the Company in connection with such litigation.

4. The Lease shall in all other respects remain in full force and effect.

IN WITNESS WHEREOF The parties hereto have caused this instrument to be executed by their duty authorized and empowered officers, this 14th day of December, 1963.

Attest:

H. O. Cake

(Seal) THE BOEING COMPANY  
By William M. Allen  
Lessee

STATE OF OREGON, acting by and through  
its Director of Veterans' Affairs  
By H. C. Saalfeld  
Lessor

STATE OF WASHINGTON )  
 ) ss  
COUNTY OF KING )

On this 17th day of December, 1963, before me, the undersigned, a Notary Public in and for the State of Washington duly commissioned and sworn, personally appeared William M. Allen, to me known to be the President of THE BOEING COMPANY, the corporation that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he is authorized to execute the said instrument and that the seal affixed is the corporate seal of said corporation.

WITNESS My hand and official seal hereto affixed,  
the day and year in this certificate above written.

Harry L. Blangy Jr.

(Seal)

Notary Public in and for the State of  
Washington, residing in Seattle.

STATE OF OREGON           )  
County of Multnomah       ) ss

On this 14th day of December, 1963, before me, a notary public in and for said county and state, personally appeared the within-named H. C. SAALFELD, to me known to be the Director of Veterans' Affairs of the

State of Oregon, who being first duly sworn did say that he executed the foregoing instrument on behalf of the STATE OF OREGON and by authority of his office; and said H. C. Saalfeld acknowledged the execution of said instrument to be the free act and deed of said State of Oregon.

IN TESTIMONY WHEREOF I have hereunto set my hand affixed my official seal, the date in this my certificate above written.

Grant T. Anderson

(Seal)

Notary Public for Oregon

My commission expires 7/24/67

## APPENDIX B

Below is set forth pp. 2 and 3 of the transcript of the pre-trial hearing in *United States v. Ellis*, No. 63-289 D. Ore. 1964), *appeal dismissed by stipulation*, No. 19763 (9th Cir. 1965), in which an oral ruling was made.

THE COURT: No. 63-289, U. S. vs. Ellis.

MR. HESS, JR: We have prepared a rough draft of pre-trial order. We haven't had the chance yet to present it to Mr. Buley.

THE COURT: I think maybe I can assist you somewhat. The legal problem has been before me for some

time now, and I am inclined to go along with the rule of the highest and best use in the foreseeable future. Of course, that is just going back to the general rule. I recognize that the Government has presented this other problem with reference to the navigational project, and certainly under certain types of claims, such as a claim for a business site along the river, the Supreme Court has held that as against the United States in all probability that type of claim should not be submitted. But I am personally convinced that the great mass of legislation in connection with the development of water and the use of waters in the West have indicated an intention on the part of Congress that as to that particular type of use, the highest and best use, there may be some value there. At least, it is a matter that should, in my opinion, be submitted to the jury.

Now it is your claim, as I generally understand it, that this property has some value by reason of its location in the vicinity of the river and for probable agricultural uses of the water; is that correct?

MR. HESS, JR: Yes, Your Honor.

THE COURT: You are making no claims for a commercial use, such as along the river, because if that is so, I believe the Supreme Court has said that the navigation rights of the United States are superior to any claim that has not been developed.

MR. HESS, JR: Your Honor, in that connection we believe it is correct that there would be no compensable right for direct access to the river from this property, but the fact that there may be other facilities located in the general area of this property that have to do with water transportation would be a factor that the jury could consider.

THE COURT: You know generally my feeling on it. You can prepare your witnesses along that line. But do not get into the field generally that they might have access there so that you could build docks, or such matters as that.

MR. HESS, JR: No, not on this particular land.

THE COURT: I will not submit that.

MR. HESS, SR: Your present thinking along that line, or your present ruling, is that we have a right to access to it for—

THE COURT: The highest and best use. You can mention the access and the highest and best use for the development, without getting into the navigable field. Once you get into that, then you are in difficulty.





No. 20278

In the

United States Court of Appeals  
For the Ninth Circuit

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ELIZABETH G. HERSCHEL, as  
surviving spouse of CHARLES F.  
HERSCHEL, deceased, and as surviving  
mother of WAYNE ANDREW  
HERSCHEL, deceased; and BRUCE  
E. KIERNAN,

*Appellants,*

vs.

MARY ELIZABETH SMITH,  
Administratrix of the Estate of  
NATHANIEL EAKINS, deceased,

*Appellee*

---

Appeal from the United States District Court  
for the District of Arizona

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Appellee's Brief

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GUST, ROSENFELD & DIVELBESS  
323 Security Building,  
Phoenix, Arizona

*Attorneys for Appellee*

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No. 20278

In the

**United States Court of Appeals**  
**For the Ninth Circuit**

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ELIZABETH G. HERSCHEL, as  
surviving spouse of CHARLES F.  
HERSCHEL, deceased, and as surviving  
mother of WAYNE ANDREW  
HERSCHEL, deceased; and BRUCE  
E. KIERNAN,

*Appellants,*

vs.

MARY ELIZABETH SMITH,  
Administratrix of the Estate of  
NATHANIEL EAKINS, deceased,

*Appellee*

---

Appeal from the United States District Court  
for the District of Arizona

---

**Appellee's Brief**

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**PREFATORY NOTE**

Appellee will, as have appellants, designate the parties as plaintiffs and defendant, as they were in the Trial Court. "T.R." designates Transcript of Record, and "A.O.B." designates Appellants' Opening Brief. "A.B." designates Appellee's Brief.



## **JURISDICTION**

Diversity of citizenship is present between parties. An amount in excess of \$10,000.00 exclusive of interest and costs is in controversy. However, the trial court had no actual jurisdiction over the person of the non-resident defendant administratrix, as set forth in the Argument.

## **STATEMENT OF THE CASE**

Plaintiffs' statement of the cases goes beyond the record in regard to matters concerning the occurrence of the accident which precipitated the action below. (A.O.B. 2).

Plaintiffs were occupants of an automobile which collided with an automobile operated by one Marva White Curtis. It is alleged she was operating her automobile as an agent of Nathaniel Eakins. The accident occurred June 23, 1962, on a public highway in northern Arizona. Nathaniel Eakins, together with others, died. (Plaintiffs' Amended Complaint. T.R. 7-13).

Thereafter on July 2, 1962, the Probate Court of Hamilton County, Ohio, appointed Mary Elizabeth Smith the Administratrix of the Estate of Nathaniel Eakins, deceased. (Plaintiffs' Amended Complaint. T.R. 7).

Thereafter, on June 22, 1964, plaintiffs filed suit in the United States District Court, District of Arizona.

Plaintiffs attempted to effect a valid service of process upon Administratrix Mary Elizabeth Smith by means of registered mail, and went through the mechanical steps of Rule 4(e) (2) Arizona Rules of Civil Procedure, as described in their Opening Brief (A.O.B. 3).

Defendant Mary Elizabeth Smith's Motion to Dismiss was filed March 24, 1965 (T.R. 20 and 51), and the Court, following oral argument, granted that Motion and ordered the

Complaint dismissed as to this defendant (T.R. 37-38). On June 9, 1965, the Court, on stipulation of counsel, entered its Amended Judgment granting defendant Mary Elizabeth Smith's Motion to Dismiss the complaint as to her as Administratrix of the Estate of Nathaniel Eakins, deceased, and specifying its decision was based upon the sole ground "— that this court lacks jurisdiction over the person of said defendant for the reason that no valid service of Summons and Complaint upon said defendant has been effected." (T.R. 41-42).

The further procedural steps described in plaintiffs' Brief (last paragraph A.O.B. 3) ensued.

### QUESTION PRESENTED

The sole question before the Court is whether utilization of Rule 4(e) (2) of Arizona Rules of Civil Procedure provides a valid means of service upon a non-resident personal representative to confer jurisdiction over such defendant upon the United States District Court of Arizona where the appointment was subsequent to the occurrence referred to in the Rule.

### ARGUMENT

Plaintiffs' argument (A.O.B. 4-6) contends ultimately only for service under Rule 4(e) (2) Arizona Rules of Civil Procedure (Complete text Appendix i).

Defendant does not dispute the argument of plaintiffs. It is a mere recital of plaintiffs' mechanical steps and does not reach the question.

*1. The Statute provides the exclusive means of service of process upon non-resident motor vehicle operator or owner defendants.*

Long prior to the occurrence involved here, Arizona Revised Statutes 28-502, and 28-503 (complete text Appendix iv and v) provided a means for out of State service of process

upon non-resident motor vehicle operators and owners whose vehicles are used on Arizona highways. The statutes make the use of such vehicle on State highways an automatic appointment of the Superintendent of Motor Vehicles as the operator and owner's attorney for service of process. No provision is made therein to require such appointment be irrevocable or to be equally binding upon the personal representative of such non-resident operator or owner. These statutes spell out the exclusive means of service upon such non-resident operators and owners. *BROWN v. HUGHES*, 136 F. Supp. 55, 59-60.

*(a) Death of non-resident motor vehicle operator or owner revokes appointment of attorney for service of process.*

It has been consistently held that under such statutes the appointment terminates with the death of the operator or owner and such statutes do not apply to personal representatives of such decedents. 8 AM.JUR.2d 417, Sec. 861; 53 ALR 2d 1194, Sec. 14; *NATIONAL UNION FIRE INS. CO. of PITTSBURGH, PA. vs. PETRO*, 189 F. Supp. 651; *HENDRICKS v. JENKINS*, 120 F. Supp. 879, *FAZIO v. AMERICAN AUTO INSURANCE CO.*, 136 F. Supp. 184; *BROWN v. HUGHES*, 136 F. Supp. 55. These last three cases succinctly point out that such statutes are in derogation of the common law and must be strictly construed. Substantively the law of Arizona does not permit out of State service of process upon personal representatives of such owners or operators.

*2. Rules of Procedure do not permit service of valid process upon a non-resident personal representative.*

Rule 4 (e) of Federal Rules of Civil Procedure (complete text Appendix iii) permits the District Court to utilize a rule of the State Court to acquire service upon a non-inhabitant of the State in which the District is located. Such utilization is

to be made “——under the circumstances and in the manner prescribed in the Statute or Rule.”

Rule 4 (e) (2) of Arizona Rules of Civil Procedure (Appendix i) provides for personal service out of the State upon a “person, partnership, corporation or unincorporated association subject to suit in a common name which has caused an event to occur in this State out of which the claim which is the subject of the complaint arose ——”.

The event which occurred was the accident of June 23, 1962 (T.R. 8). Defendant Smith was appointed Administratrix July 2, 1962 (T. R. 7). It is not contended, nor could she have caused the event to occur some nine days earlier. The rule clearly cannot be applied to her to effect a valid service.

The Arizona rule specifically enumerates the persons and entities that fall within its purview. It is significant it does not specify a personal representative as one of those upon whom it operates. The HENDRICKS, FAZIO and BROWN cases, supra, point out the requirement of strict construction of a statute in derogation of the common law. If the District Court acquires jurisdiction over the defendant it must do so through enabling Rule 4(e) Federal Rules of Procedure. That rule includes “statutes” and “rules” within the same category. No basis for distinction can be found for permitting or requiring a procedural rule, as Arizona’s, to be construed in a different manner from a statute when that rule is in derogation of the common law. Thus the plaintiffs’ attempted service was not made in the manner prescribed in the State rule as is required by Federal Rule of Procedure 4(e).

While Rule 4(e) (2) Arizona Rules of Civil Procedure has been held valid as relating to procedural matters, and permitting service upon a foreign corporation which came into the state, such corporation was a creature specifically recognized by the rule. HEAT PUMP EQUIPMENT CO. v. GLEN

ALDEN CORPORATION, 93 Ariz. 361, 380 P. 2d 1016. Such a procedural rule cannot create or nullify the substantive law of the State.

3. *Plaintiffs recognized the lack of means of valid service upon non-resident personal representatives.*

Plaintiffs' attempt at service upon defendant Smith by utilization of Rule 4(e) (2) Arizona Rules of Procedure rather than Arizona Revised Statutes Sec. 28-502 and 28-503 is tacit acceptance of the impossibility of acquiring valid service thereunder. We cannot understand why they were not equally realistic concerning Rule 4(e) (2) and did not bring their action in the unquestioned jurisdiction of Courts in the State or District in which the Administratrix was appointed.

### CONCLUSION

Defendant Administratrix does not fall within the scope of Arizona Rules of Civil Procedure, Rule 4(e) (2) either on its face or by indirection. We submit the only interpretation possible is the one reached by Judge Muecke, that the Court lacked jurisdiction over the person of the defendant for the reason no valid service of the Summons and Complaint upon the defendant has been effected.

We submit the question presented should be answered in the negative and the judgment of the United States District Court be affirmed.

Respectfully submitted,  
GUST, ROSENFELD & DIVELBESS  
By: JAMES F. HENDERSON  
Attorneys for Appellee

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and in my opinion the foregoing Brief is in full compliance with those Rules.

JAMES F. HENDERSON  
Attorney for Appellee

## *Appendix*

### **RULES OF CIVIL PROCEDURE Rule 4(e)**

4(e) (2) Summons; personal service out of state. When the defendant is a resident of this state, or is a corporation doing business in this state, or is a person, partnership, corporation or unincorporated association subject to suit in a common name which has caused an event to occur in this state out of which the claim which is the subject of the complaint arose, service may be made as herein provided, and when so made shall be of the same effect as personal service within the state. In case of a corporation or partnership or unincorporated association, service under this Rule shall be made on one of the persons specified in Section 4(d) (6).

(a) Registered mail. When the whereabouts of a defendant outside the state is known, the serving party may deposit a copy of the summons and complaint in the post office, registering it with a return receipt requested. Upon return through the post office of the registry receipt, he shall file an affidavit with the court showing the circumstances warranting the utilization of the procedure authorized under Section 4(e) and (a) that a copy of the summons and complaint was dispatched to the party being served; (b) that it was in fact received by the party as evidenced by the attached registry receipt; (c) that the genuine receipt thereof is attached; and (d) the date of the return thereof to the sender. This affidavit shall be prima facie evidence of personal service of the summons and complaint and service shall be deemed complete and time shall begin to run for the purposes of Section 4(e) (4) of this Rule thirty (30) days after the filing of the affidavit and receipt.

(b) Direct service. Service out of the state may also be made in the same manner provided in Section 4(d) of this Rule by a person authorized to serve process under the law of the state where such service is made. Service shall be complete



## *Appendix*

when made and time for purposes of Rule 4(e) (4) shall begin to run at that time, provided that before any default may be had on such service, there shall be filed an affidavit of service showing the circumstances warranting the utilization of the procedure under Section 4 (e) (1) and attaching an affidavit of the process server showing the fact of the service. Amended July 14, 1961. Effective on and after midnight Oct. 31, 1961.

## *Appendix*

### **RULE 4. PROCESS**

(e) Same. Service Upon Party Not Inhabitant of or Found Within State. Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

## *Appendix*

### **Sec. 28-502. Appointment by nonresident of attorney upon whom to serve process.**

A. The rights and privileges conferred by Sec. 28-501 and paragraphs 3, 4 and 5 of Sec. 28-412, shall be deemed accepted, and such acceptance evidenced, by a nonresident:

1. When the nonresident, by himself or his agent, operates a motor vehicle on a public highway in this state under the provisions of and the conditions imposed by such sections.

2. When the nonresident, by himself or his agent, operates a motor vehicle on a public highway in this state otherwise than under the provisions of such section.

3. When a motor vehicle owned by a nonresident, is operated on a public highway in this state with his express or implied permission under such circumstances as would render a resident motor vehicle owner liable for damages to person or property caused by such operation.

B. The acceptance of the rights and privileges set forth in sub-section A of this section shall be deemed to constitute and be the appointment of the vehicle superintendent by the nonresident as his true and lawful attorney upon whom may be served all legal process in an action against such nonresident growing out of any accident or collision in which the nonresident, his agent or other person operating a motor vehicle owned by him with his express or implied permission on a public highway in this state, is involved.

C. The provisions of this section shall also apply to a nonresident defendant who was a resident of the state at the time of the accident or occurrence which gave rise to the action.

## *Appendix*

### **Sec. 28-503. Service on vehicle superintendent and notice to nonresident; proof of service.**

A. Service of process under Sec. 28-502 shall be made by leaving a copy of the summons and complaint and a fee of two dollars with the vehicle superintendent, or in his office during office hours and shall be deemed sufficient service upon the nonresident if either of the following are complied with:

1. The plaintiff forthwith sends notice of such service and a copy of the summons and complaint by registered mail to the nonresident defendant, appends defendant's return receipt and plaintiff's affidavit of compliance with this section and Sec. 28-502 to the original summons and files them with the court within such time as the court allows.

2. The plaintiff serves notice of such service and a copy of the summons and complaint upon defendant, if found without the state, by a duly constituted officer qualified to serve like process in the state or the jurisdiction where defendant is found, and files with the court within such time as the court allows, the officer's return showing that the notice, copy of the summons and complaint were served as provided by this section upon defendant.

B. The court in which the action is pending may order postponements necessary to afford defendant reasonable opportunity to defend the action.

C. The superintendent shall keep a record, which shall include the day and hour of service, of all process served upon him under this section.

D. The fee paid to the superintendent at the time of service shall be taxed as costs in the suit if plaintiff recovers.



No. 20278

In the

United States Court of Appeals  
for the Ninth Circuit

---

ELIZABETH G. HERSCHEL, as surviving spouse  
of CHARLES F. HERSCHEL, deceased, and as  
surviving mother of WAYNE ANDREW  
HERSCHEL, deceased; and BRUCE E.

KIERNAN,

*Appellants,*

vs.

MARY ELIZABETH SMITH, Administratrix of  
the Estate of NATHANIEL EAKINS, deceased,

*Appellee.*

---

Appeal from the United States District Court  
for the District of Arizona

**Appellants' Opening Brief**

---

MOORE, ROMLEY, KAPLAN, ROBBINS,  
& GREEN

1600 Arizona Title Building  
Phoenix, Arizona

*Attorneys for Appellants*





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Appeal from the United States District Court  
for the District of Arizona

## Appellants' Opening Brief

---

### PREFATORY NOTE

Appellants were plaintiffs below, and appellee was defendant below. For convenience and uniformity, all parties will be referred to in this brief as they were at the trial court. "T.R." designates the Transcript of Record.

### JURISDICTION

The jurisdiction of the District Court is founded on diversity of citizenship and an amount in controversy in excess of \$10,000, exclusive of interest and costs, as alleged in plaintiffs' Amended Complaint (T.R. 7-13).

The final judgment of the District Court was entered on June 9, 1965 (T.R. 41-42). Plaintiffs' Notice of Appeal was filed on June 9, 1965 (T.R. 43-44).

### STATEMENT OF THE CASE

The allegations of plaintiffs' Amended Complaint describe an automobile accident involving the persons whose estates are parties to this action (T.R. 7-13).

Charles F. Herschel was driving in an easterly direction late at night in northern Arizona on Highway 66. His grandson, Wayne Herschel, and a friend, Bruce Kiernan, were passengers. Approaching the Herschel vehicle from the opposite direction was a vehicle being driven by Marva White Curtis, who was the agent for her passenger, Nathaniel Eakins. Rita Lazano was also a passenger in this vehicle. Marva White Curtis negligently drove her automobile into the opposing lane of traffic and collided headon with the Herschel vehicle.

In addition to causing her own instantaneous death, the negligence of Marva White Curtis resulted in the deaths of her passenger, Nathaniel Eakins, the driver of the oncoming vehicle, Charles Herschel, and his grandson, Wayne Herschel, all of whom died at the accident scene. The other passenger in the Herschel vehicle, Bruce Kiernan, escaped death but sustained permanently crippling injuries.

Since the collision resulted in the deaths of all the persons legally responsible for it, suit could not, of course, be filed against them directly. Being residents of the State of Ohio, personal representatives were duly appointed for their estates by the Probate Court of Hamilton County, Ohio. Mary Elizabeth Smith was appointed administratrix for the estate of Nathaniel Eakins, deceased, on July 2, 1962; Milton Thurman, Jr. was appointed administrator for the estate of Marva White Curtis on May 20, 1964. These personal representatives were and still are residents of the State of Ohio.

Suit was filed on behalf of the occupants of the Herschel

vehicle in the United States District Court for the District of Arizona against Mary Elizabeth Smith, Administratrix of the Estate of Nathaniel Eakins, deceased; and Milton Thurman, Jr., Administrator of the Estate of Marva White Curtis, deceased (T.R. 1-6). Service of the Alias Summons and Amended Complaint was achieved in each case by the method set out in Rule 4(e), Federal Rules of Civil Procedure, and Rule 4(e)(2), Arizona Rules of Civil Procedure. Copies of the Alias Summons and Amended Complaint were served by registered mail upon Mary Elizabeth Smith, as administratrix for the estate of Nathaniel Eakins (T.R. 15-16), and upon Milton Thurman, Jr., as administrator for the estate of Marva White Curtis (T.R. 18-19). Affidavits of service of process with the registry receipts attached were duly filed with the District Court on February 15, 1965 (T.R. 15-16, 18-19).

Thereafter, Mary Elizabeth Smith, as administratrix for the estate of Nathaniel Eakins, deceased, filed a Motion to Dismiss upon the grounds that this court does not have jurisdiction over her person (T.R. 20). On May 10, 1965, defendant's Motion came on regularly to be heard before the Honorable Judge Muecke in the United States District Court for the District of Arizona. The court ruled in favor of defendant and entered its order dismissing plaintiffs' Amended Complaint as to Mary Elizabeth Smith, administratrix for the estate of Nathaniel Eakins, deceased (T.R. 37-38).

On June 9, 1965, the court entered its Amended Judgment in favor of defendant Mary Elizabeth Smith, administratrix for the estate of Nathaniel Eakins, deceased, wherein the court expressly found, in accordance with Rule 54(b), Federal Rules of Civil Procedure, that there was no just cause for delay in rendering final judgment (T.R. 41-42).

On June 9, 1965, plaintiffs filed their Notice of Appeal (T.R. 43-44), Bond for Costs on Appeal (T.R. 45-46), and Designation of Contents of Record on Appeal (T.R. 47-48) and defendant filed her Designation of Additional Parts of



Record on Appeal (T.R. 49). On July 29, 1965, plaintiffs filed their Statement of Points to be Relied Upon (T.R. 54-55).

### **ASSIGNMENTS OF ERROR**

1. The District Court erred in concluding that it did not have jurisdiction over Mary Elizabeth Smith, administratrix for the estate of Nathaniel Eakins, deceased;

2. The District Court erred in granting defendant's motion to dismiss plaintiffs' Amended Complaint as to Mary Elizabeth Smith, administratrix of the estate of Nathaniel Eakins, deceased;

3. The District Court erred in granting judgment to the defendant Mary Elizabeth Smith, administratrix for the estate of Nathaniel Eakins, deceased.

### **ARGUMENT**

The ultimate question on appeal is whether or not the procedure which plaintiffs employed for obtaining jurisdiction over Mary Elizabeth Smith, administratrix for the estate of Nathaniel Eakins, deceased, effectively brought the estate within the jurisdiction of the United States District Court for the District of Arizona.

Resolution of this question must begin with an examination of Rule 4 of the Federal Rules of Civil Procedure, which pertains to process in the federal courts. Subsection (e) of this rule establishes the method by which a federal district court may obtain jurisdiction over a person who is neither an inhabitant of the state nor found within the state where the federal district court is held. This subsection provides:

“\* \* \* \* Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons . . . upon a party not an inhabitant of or found within the state . . . service may . . . be made under the circumstances and in the manner prescribed in the statute or rule.”

In Rule 4(e)(2), Arizona Rules of Civil Procedure, the Arizona Supreme Court has provided a method for obtaining

jurisdiction over persons who are neither inhabitants of nor found within the State of Arizona. One of the avenues by which the extra territorial service of process will result in jurisdiction is as follows:

“When the defendant is a . . . person . . . [who] has caused an event to occur in this state out of which the claim which is the subject of the complaint arose, service may be made as herein provided, and when so made shall be of the same effect as personal service within the state . . . .

“(a) Registered mail. When the whereabouts of a defendant outside the state is known, the serving party may deposit a copy of the summons and complaint in the post office, registering it with a return receipt requested. Upon return through the post office of the registry receipt, he shall file an affidavit with the court showing the circumstances warranting the utilization of the procedure authorized under Section 4(e) (1); and (a) that a copy of the summons and complaint was dispatched to the party being served; (b) that it was in fact received by the party as evidenced by the attached registry receipt; (c) that the genuine receipt thereof is attached; and (d) the date of the return thereof to the sender . . . .”

Plaintiffs have fulfilled each of the requirements of this rule:

1. Nathaniel Eakins clearly caused an event to occur within the State of Arizona which is the subject matter of this lawsuit. Since he is deceased it is, of course, impossible to serve him directly. Service has therefore been accomplished against Mary Elizabeth Smith, the individual who voluntarily assumed the rights and obligations of collecting the assets and discharging the just debts of the deceased tortfeasor's estate.

2. Plaintiffs deposited a copy of the Alias Summons and Amended Complaint in the post office, addressed it to Mary Elizabeth Smith, 3836 Iona Avenue, Cincinnati, Ohio, and registered it with a return receipt requested.

3. Upon return through the post office of the registered receipt, plaintiffs filed an affidavit with the court showing the

circumstances warranting the utilization of the procedure authorized under section 4(e)(1) and further showing that: (a) a copy of the Alias Summons and Amended Complaint was dispatched to Mary Elizabeth Smith, administratrix for the estate of Nathaniel Eakins, deceased; (b) that it was in fact received by Mary Elizabeth Smith, administratrix for the estate of Nathaniel Eakins, as evidenced by the attached registry receipt; (c) that the genuine registry receipt was attached; and (d) the return of service was received by plaintiffs on February 9, 1965 (T.R. 15-16).

### CONCLUSION

Thus, the United States District Court for the District of Arizona has jurisdiction over Mary Elizabeth Smith, administratrix for the estate of Nathaniel Eakins, deceased, since each element of Arizona Rules of Civil Procedure 4(e)(2) has been complied with.

Because of the foregoing, plaintiffs respectfully request this court to reverse the United States District Court's ruling dismissing plaintiffs' Amended Complaint and finding that the procedures employed have effectively brought Mary Elizabeth Smith, administratrix for the estate of Nathaniel Eakins, deceased, within the jurisdiction of the United States District Court for the District of Arizona.

Respectfully submitted

MOORE, ROMLEY, KAPLAN, ROBBINS  
& GREEN

By PHILLIP A. ROBBINS  
BRUCE G. DEBES

*Attorneys for Appellants*

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

BRUCE G. DEBES

*Attorney for Appellants*

**In the United States Court of Appeals  
for the Ninth Circuit**

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**PACIFIC ELECTRICORD COMPANY, PETITIONER**

*v.*

**NATIONAL LABOR RELATIONS BOARD, RESPONDENT**

---

**On Petition for Review and to Set Aside, and on Cross-  
Petition for Enforcement of an Order of the  
National Labor Relations Board**

---

**BRIEF FOR THE NATIONAL LABOR RELATIONS  
BOARD**

---

**ARNOLD ORDMAN,**  
*General Counsel,*

**DOMINICK L. MANOLI,**  
*Associate General Counsel,*

**MARCEL MALLET-PREVOST,**  
*Assistant General Counsel,*

**WARREN M. DAVISON,  
MARTIN R. GANZGLASS,**  
*Attorneys,*

*National Labor Relations Board.*

**FILED**

**JAN 17 1966**

WILLIAM E. WILSON, Clerk



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**In the United States Court of Appeals  
for the Ninth Circuit**

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No. 20276

PACIFIC ELECTRICORD COMPANY, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

---

**On Petition for Review and to Set Aside, and on Cross-  
Petition for Enforcement of an Order of the  
National Labor Relations Board**

---

**BRIEF FOR THE NATIONAL LABOR RELATIONS  
BOARD**

---

**COUNTERSTATEMENT OF THE CASE**

This case is before the Court upon a petition for review and to set aside an order of the National Labor Relations Board, issued against petitioner on June 25, 1965, following proceedings under Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*). In its answer, the Board requests enforcement of its order. The Board's decision and order

(R. 27-30) are reported at 153 NLRB No. 37.<sup>1</sup> This Court has jurisdiction of the proceedings under Section 10(e) and (f) of the Act, the unfair labor practices having occurred at Gardena, California where petitioner is engaged in the manufacture of electrical products. No jurisdictional issue is presented.

### **I. The Board's findings of fact**

Briefly, the Board found, in agreement with the Trial Examiner, that the Company violated Sections 8(a)(2) and (1) of the Act by dominating the Employee Committee and by assisting it with direct financial support and by announcing, immediately before an election between the IBEW<sup>2</sup> and the Employee Committee, that the Company was granting a 5¢ an hour wage increase pursuant to the Committee's persistent requests. The Board also found that the Company violated Section 8(a)(1) by singling out the IBEW organizers in the plant and warning them of possible disciplinary action for violation of the company rules. Finally, the Board found that employee Kaguk had been fired for engaging in protected concerted activities, in violation of Section 8(a)(1).

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<sup>1</sup> References to the pleadings, the decision and order of the Board, and other papers, reproduced as "Volume I, Pleadings," are designated "R." References to portions of the stenographic transcript reproduced pursuant to Court Rules 10 and 17 are designated "Tr." "G.C.X" and "R.X" denote General Counsel's and Respondent's exhibits, respectively. References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

<sup>2</sup> International Brotherhood of Electrical Workers.

The evidence on which these findings are based is summarized below.

***A. Company domination of and assistance to the Employee Committee***

The Employee Committee was formed in 1956 and consists of five members who are elected for one-year terms by all the factory non-supervisory employees (R. 17; Tr. 8). Both the nominations and the actual run-off elections are held at the plant on company time (R. 17; Tr. 22-24, GCX 4). The ballots are prepared by company office workers, on company time, using company supplies and equipment (R. 17; Tr. 22-24). The personnel manager and his assistants distribute these ballots to each of the eligible employees. Both the meetings between the Committee and the Company as well as internal Committee meetings are held on company time at the plant (R. 17; Tr. 14-15, 26-27). The minutes of the joint meetings are typed by office personnel, again using company facilities and supplies, and are mailed to each employee at company expense (R. 17; Tr. 12-13). The Committee does not collect any dues and has never held a general meeting of all the employees since its inception (R. 17; 52-53). In late 1963, when the Committee decided to print the bylaws which then existed only in the memory of some management and Committee members, the employees, although asked to donate money to cover the expenses involved, did not contribute enough (R. 18; Tr. 16, 56-58). The additional amount was obtained from a fund consisting of the profits derived from the vending machines,

which the Company permitted to be located throughout the plant (R. 18; Tr. 90-91). The bylaws were then printed although they were never submitted to all the employees for a vote of approval (R. 18; Tr. 59-60). When a vacancy occurred on the Committee due to the discharge of member Kaguk, Vice-President Hamel prepared a written statement without consulting the Committee, naming Kaguk's successor (R. 17; GCX 4 "I" p. 6). This statement was mimeographed and distributed to all the employees at Company expense (R. 17).

Sometime in May 1963, the Committee requested a wage increase (R. 17). On October 8, Company President Schott met with all the employees and explained why the Company could not grant a wage increase immediately (R. 17; Tr. 45-46). He promised them a general wage increase as soon as the profits reached 5 percent or, in any event, by February 1, 1964 (R. 17; Tr. 45-46). In November 1963, the IBEW filed a petition with the Board seeking certification as the bargaining representative of the Company's employees (R. 18). On December 5, a consent election agreement was executed, scheduling the election between the Committee and the IBEW for December 12 (R. 18). On December 9, President Schott learned that profits for October had exceeded 5 percent but the Company decided that no wage announcement should be made because of the pending election (R. 18; Tr. 310-311). However, the next day, the Company held a special meeting of all of its employees which lasted 5 hours (R. 18; 313). At this meeting, in answer to a question by an employee about when



they could expect a wage raise, President Schott emphasized how the Committee had persistently attempted to obtain a wage increase for the employees and revealed that he would raise wages by 5¢ an hour beginning January 1, no matter how the election between the Committee and the IBEW came out (R. 18; Tr. 34-35, GCX 8). Two days later the employees voted 65 to 43, with 17 challenged ballots, to retain the Committee as their bargaining representative. The IBEW filed timely objections to the election and the Regional Director set aside the election and withdrew his approval of the Agreement for Consent Election.

***B. The company warning to members of the IBEW organizing committee***

On September 6, as a result of employee Richard Kaguk's request, he and several other employees met with IBEW representatives (R. 20; Tr. 95-96). Subsequently, Kaguk and the other employees sought to obtain employee signatures to IBEW designation cards and prominently displayed these cards in their shirt pockets (R. 20; Tr. 96-97). On September 26, the IBEW notified the Company by letter that five named employees were members of the IBEW organizing committee in the plant (R. 21; Tr. 33-34, GCX 7). Upon receiving this letter, the Company immediately warned these individuals in writing over President Schott's signature:

Please be certain that you comply with all Company rules and regulations; otherwise you will be subject to disciplinary action.



(R. 21; Tr. 33-34, GCX 7). None of the other approximately 200 employees in the plant received such a warning (R. 21; Tr. 34).

*C. The discharge of Employee Committee member  
Richard Kaguk*

Richard Kaguk was hired on February 22, 1963, as a worker in the G & L department<sup>3</sup> (Tr. 95). He was a satisfactory employee. His starting hourly rate was \$1.45 and within 2 months after being hired he received a 5¢ an hour increase (R. 19; Tr. 115-116). His hourly rate was increased by 5 more cents on May 27, and by 10¢ a little more than a month before he was fired (R. 19; Tr. 115-116).

In the summer of 1963, the Company changed its work standards and incentive program in several departments of its plant, causing the workers' earnings to drop sharply. Company practice had been to pay the employee a bonus for producing more than the set hourly piece rate as an incentive for greater production (R. 19; Tr. 103). For example, if the rate were 10 pieces an hour, and the employee produced 20, he received an extra hour's pay (Tr. 103-104). The changes in the plan raised the standard number of pieces per hour, making it harder to get a bonus (R. 19; Tr. 105). William Cadie, an employee in the G & L department, testified that after the Company had changed the standard rate, his earnings had fallen by 35 to 40 percent and sometimes he was not even able to make the basic standard at all (Tr. 149-150).

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<sup>3</sup> The name comes from the type of machinery used in the department.

Jesus Zapata, another employee in the G & L department, testified that his wages dropped 50 percent and the new standard caused Kaguk's earnings to decrease by about 40 percent (Tr. 197). Kaguk testified that he, too, could not even make the basic standard as frequently as he had been able to prior to the change in quotas (Tr. 105-106).

There was widespread employee dissatisfaction with the higher standards. Zapata protested about the new rates in the G & L department to Plant Manager Henry Clark (Tr. 197). Zapata asked him when he was going to correct the standards and Clark replied, "Jesse, don't worry about it. I been working on the standards" (Tr. 198). Zapata persisted by asking, "How long you been working on the standards, for how much time you going to need?" and when Clark replied that he was trying to fix them, Zapata added that the standards were wrong and if Clark couldn't fix them, the employees would do something about them (Tr. 198-200).

On August 22, the Employee Committee met with management and told them that the work standards for coiling were "still pretty tight" (GCX 9(a)). The Committee also brought up the employees' complaints that "many new jobs and some old jobs were coming out with impossible standards," the packing and inspection area standards were causing a "great many problems," there was a "standard problem on the preassembly and molding" and the changed work quotas in the G & L department were unfair (GCX 9(a)). The company representatives replied that the standards in both the coiling and G & L departments

were accurate and fair, and the other work quota problems would be dealt with as soon as possible (GCX 9(a)).

Soon after the standards had been changed in the G & L department, employees Kaguk and Cadie together protested several times to various management officials, including Plant Manager Eggert and Time Standards Engineer Mallrich (Tr. 107-108, 118-120, 161). Kaguk repeatedly told them that the standards were wrong and requested to see the construction sheets<sup>4</sup> upon which the standards were based, contending that "the employees were entitled to see [them]" (Tr. 121-122). Kaguk testified that in spite of his requests, the Company never offered to take "the standard apart and [show] us why it was set up the way it was . . ." (Tr. 122-123).<sup>5</sup>

On August 28, after one month of protesting as an ordinary employee, Kaguk ran for, and was elected to, membership on the Employee Committee in order to have "standing to talk to the Company about the G & L department" (R. 19; Tr. 125). On September 3, the Committee met with representatives of management in President Schott's office (R. 19; Tr. 100-101). During this meeting, which lasted about 5

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<sup>4</sup> The construction sheets showed how many seconds it took to perform each step of an operation (Tr. 122).

<sup>5</sup> The Company however, hired an outside firm of industrial engineers to check the new standards; this firm concluded that the rates were fair and recommended that they be continued (Tr. 119). Kaguk met with these engineers, complained about the standards and although they showed him a construction sheet, they never explained it to him (Tr. 119).

hours, Kaguk sought to discuss the issue of the new work quotas in the G & L department (R. 19; Tr. 101-102). Louise Wallace, the Chairman of the Employee Committee, then read to the company personnel a letter signed by employees Kaguk and Cadie expressing the employees' "feelings about a problem which has been argued back and forth between the employees and the management for approximately the last six weeks," namely, the revised work quotas and standards (R. 19; Tr. 103, R.X. 4). The letter stated that the employees in the G & L department felt that the Company had treated them unfairly, and were dissatisfied with their loss of earnings and the explanations given them by management personnel (R. 19; Tr. 103, RX 4). The employees felt that the Company had evasively answered their questions and kept them "in the dark" while time studies of their jobs were being made, and then had put into effect too high standards and refused to compromise on them despite several meetings between management and the employees (Tr. 103, RX 4). Kaguk testified that the letter was "a request, actually, to compromise which [the Company] hadn't wanted to do" (Tr. 103). President Schott replied that the Company would try to determine if the quotas were wrong "or if the operation was being done incorrectly" (GCX 9(b)). The Committee then raised the issue of high work quotas in other departments throughout the plant and it was agreed that "all packing and inspection standards will be rechecked . . . in approximately two weeks" (GCX 9(b)).

Two days after this meeting with the Company, Kaguk contacted representatives of the IBEW (R. 20; Tr. 95-96). On September 6, he and several other employees, including William Cadie of the G & L department, met with the IBEW organizers and discussed the issue of the new time standards (Tr. 129-130). Kaguk and several other employees agreed to distribute authorization cards and solicit employee support for the IBEW (R. 20; 96-98).

On September 15, Time Standards Engineer Mallrich approached Kaguk at his work station in the G & L department and told him that he was going to run a time study of Kaguk's work to see if the new quotas were accurate (R. 19; Tr. 110-111). Kaguk agreed but requested that Mallrich show him the construction sheet so that he could perform each step of the operation according to the sheet while Mallrich timed him to see if each step could in fact be done in the time allotted (R. 19; Tr. 110, 126). Mallrich told him that "it wasn't necessary for [him] to have a construction sheet" and all Kaguk had to do was to "sit down and do the job the best way [he] could and if [he] did anything wrong, [Mallrich] would let [him] know" (Tr. 110). Kaguk refused to demonstrate his working techniques because he was afraid that the Company might again change the quotas to his disadvantage (Tr. 110-111). In the course of the argument that followed, Kaguk told Mallrich that if the IBEW successfully organized the plant, management "would be forced to compromise with [the employees] a little bit instead of fighting [them] all the time" (Tr. 110).



On September 19, employee William Cadie was having difficulty with the machine he was working on (R. 19-20; Tr. 159). His supervisor, Daniel Kolat, came over and at first told him how to adjust the machine but then changed his mind and told Cadie to do rework jobs instead (Tr. 109, 166-167). The work Cadie had been doing had a bonus incentive if he managed to do better than the standard rate, while the rework Kolat had assigned him to did not (Tr. 167). Cadie complained to Kaguk who was working a few feet away that "they was (sic) going to put me on rework when there was standard work to be done . . . ." (Tr. 159, 168). Kaguk then spoke to Supervisor Kolat about Cadie's job assignment and Kolat told him to go back to work (R. 19-20; Tr. 126, 168). Following a "heated argument", Kolat and Assistant Plant Manager Clark reported the incident to Vice-President Hamel (Tr. 327). Hamel decided to issue a written warning to Kaguk and to suspend him for 5 days, and he sent Kaguk a telegram on the afternoon of September 19 notifying him of the disciplinary layoff (R. 20; Tr. 327-328, GCX 17). On September 20, Kaguk went to the plant to pick up a sweater he had left there the day before and to talk to President Schott about his layoff, if the opportunity arose (R. 20; Tr. 112-113). The starting time in the G & L department is 7:30 a.m., and at about 7:20 Kaguk met Cadie in the Company parking lot and the two went into the plant together (R. 20; Tr. 113). Cadie punched in, went immediately to the G & L department and turned on his machine to get it warmed up, a process which takes



around 20 minutes (R. 20; Tr. 151-152). While Cadie prepared the material he was going to mold when his machine was ready, Kaguk remained and talked with him (R. 20; Tr. 114, 152). Vice-President Hamel walked by and saw Kaguk there but said nothing to him (Tr. 114). At 7:30 the work bell rang, and only about 1 minute later, while Kaguk was sitting and talking with Cadie, Hamel returned, yanked Kaguk out off his chair and said, "Come with me. You're fired." (R. 20; Tr. 115, 152). When Kaguk asked why, Hamel said he had violated a Company rule forbidding any one except current employees from entering the plant without the permission of the plant manager (R. 20; Tr. 115). After waiting in the front office for more than an hour, Kaguk received his final check and termination notice (Tr. 115). Assistant Plant Manager Clark walked with him back to the G & L department "to prevent any further trouble" while he picked up his sweater, and then escorted him to the door of the plant (Tr. 115). The Company sent a letter to all the employees explaining that Kaguk had been fired for "repeated insubordination and violation of long-standing Company rules" (R. 20; Tr. 177-178, GCX 4).

## II. The Board's Conclusions and Order

The Trial Examiner found that the Company violated Section 8(a)(2) and (1) of the Act by dominating and assisting the Employee Committee, and that it further violated Section 8(a)(1) by singling out those employees who were engaged in organizational work on behalf of the IBEW and warning them that

they might be disciplined for violating any plant rules. The Company filed no exceptions to these unfair labor practice determinations and the Board adopted them *pro forma*. The Board further found, contrary to the Examiner, that the Company violated Section 8(a)(1) of the Act by discharging employee Kaguk because he was engaged in protected concerted activities.<sup>6</sup>

The Board's order (R. 24-25, 29-30) directs the Company to cease and desist from the unfair labor practices found and from in any like or related manner interfering with, restraining or coercing its employees in the exercise of their statutory rights. Affirmatively, the Company is directed to withdraw and withhold recognition from the Employee Committee and to disestablish it, to reinstate Kaguk with backpay, and to post the appropriate notices.

### ARGUMENT

#### I. The Board Properly Found That the Company Violated Section 8(a)(2) and (1) of the Act

Except with regard to the discharge of Kaguk (discussed *infra*, pp. 14-20), petitioner is precluded from now attacking the propriety of the Board's findings and conclusions herein. For, although the

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<sup>6</sup> In reversing the Trial Examiner on this point, the Board did not disturb his findings of fact but drew different conclusions from those facts. In these circumstances, the Trial Examiner's contrary conclusions are not entitled to special weight. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 494, 496; *N.L.R.B. v. Texas Independent Oil Co.*, 232 F. 2d 447, 451 (C.A. 9).

Trial Examiner found that petitioner dominated and assisted the Employee Committee in violation of Section 8(a)(2) and (1) of the Act, and that it unlawfully singled out IBEW adherents for warnings regarding violations of plant rules, contrary to Section 8(a)(1), petitioner filed no exceptions thereto. Under settled law, petitioner is barred by the provisions of Section 10(e) of the Act from attacking those findings in this Court. *N.L.R.B. v. Ochoa Fertilizer Corp.*, 368 U.S. 318, 322; *N.L.R.B. v. Giustina Bros. Lumber Co.*, 253 F. 2d 371, 374 (C.A. 9); *N.L.R.B. v. Noroian*, 193 F. 2d 172, 173 (C.A. 9); *N.L.R.B. v. Mooney Aircraft, Inc.*, 310 F. 2d 565, 566 (C.A. 5); *Kovach v. N.L.R.B.*, 229 F. 2d 138, 143-144 (C.A. 7); *N.L.R.B. v. Community Motor Bus Co.*, 335 F. 2d 120, 120-121 (C.A. 4).<sup>7</sup>

## II. Substantial Evidence on the Record as a Whole Supports the Board's Finding That the Company, in Violation of Section 8(a)(1) of the Act Fired Employee Richard Kaguk for Engaging in Protected Concerted Activities

The sole contested issue before the Court is whether substantial evidence on the record as a whole supports the Board's finding that Kaguk was fired for engaging in protected concerted activities.

Section 8(a)(1) of the Act prohibits employers from interfering with, restraining or coercing em-

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<sup>7</sup> Indeed, petitioner does not seek to attack these findings here. Thus, its brief to the Court deals only with the Board's finding that Kaguk's discharge was violative of the Act. And in its petition for review, petitioner specifically requests the Court to affirm the Trial Examiner's Decision which found these violations of Section 8(a)(2) and (1). (R. 32).

ployees in the exercise of their rights under Section 7 to engage in concerted activities for their mutual aid or protection. As the Company properly recognizes (br. p. 5), the activities of employees come within Section 7 if they are both of a protected and a concerted nature. See e.g., *N.L.R.B. v. Washington Aluminum Co.*, 370 U.S. 9, (employees fired for walking off the job to protest lack of heat in the plant); *N.L.R.B. v. Trumbull Asphalt Co.*, 327 F. 2d 841, 843 (C.A. 8), (employees fired for meeting with company officials to discuss working conditions); *N.L.R.B. v. Halsey W. Taylor Co.*, 342 F. 2d 406 (C.A. 6), (employees fired for complaining about a foreman taking work away from another employee, thus cutting down overtime pay); *Duo-Bed Corp. v. N.L.R.B.*, 337 F. 2d 850 (C.A. 10), cert. denied, 380 U.S. 912 (employee fired for instigating a petition for a wage increase); *I.L.G.W.U. v. N.L.R.B.*, 299 F. 2d 114 (C.A.D.C.), order after remand enforced *sub nom*, *Walls Mfg. Co. v. N.L.R.B.*, 321 F. 2d 753 (C.A.D.C.), cert. denied, 375 U.S. 923, (employee discharged for protesting unsanitary conditions of the restroom to the Texas State Health Dept.); *N.L.R.B. v. City Transportation Co.*, 303 F. 2d 299 (C.A. 5), cert. denied, 371 U.S. 920, (company fired employees to crush a movement by them to obtain relief from intolerable working conditions); *N.L.R.B. v. McCatron*, 216 F. 2d 212 (C.A. 9), cert. denied, 348 U.S. 943 (employees fired for striking to bring about the reinstatement of another employee whom the strikers mistakenly believed had been fired for union activity); *N.L.R.B. v. Globe Wireless, Ltd.*, 193 F. 2d

748 (C.A. 9), (employees fired for striking to protest another employee's discharge); *N.L.R.B. v. Phaostron Instrument & Electronic Co.*, 344 F. 2d 855, 858-859 (C.A. 9) (same); *Red Top Cab Co., et al.*, 145 NLRB 1433 (employee fired for protesting about favoritism in job assignments which adversely affected his earnings). Employee activities are "concerted" if the employees engage in some sort of group action or have discussions "with the object of initiating, or inducing or preparing for group action \* \* \* in the interest of the employees." *Mushroom Transportation Co. v. N.L.R.B.*, 330 F. 2d 683, 685 (C.A. 3); accord, *N.L.R.B. v. Halsey W. Taylor Co.*, *supra*, at pp. 407-408; *Duo-Bed Corp. v. N.L.R.B.*, *supra*, at p. 851; *I.L.G.W.U. v. N.L.R.B.*, 299 F. 2d 114, 115-116 (C.A. D.C.), order after remand enforced *sub nom. Walls Mfg. Co. v. N.L.R.B.*, 321 F. 2d 753 (C.A. D.C.), cert. denied, 375 U.S. 923.

We submit that the record provides ample support for the Board's finding that Kaguk engaged in concerted protected activities, persistently complaining on behalf of the employees in the G & L department about the new production standards, until he was fired by the Company for these very activities.

Kaguk was first hired in February 1963 and was a satisfactory employee. Only after the Company changed the work production standards did Kaguk become "troublesome" from the Company's point of view. As a result of the new standards, Kaguk and his fellow employees in the G & L department suffered a 35-50 percent loss of earnings, which naturally pro-



voked widespread employee dissatisfaction. For a period of about 6 weeks, Kaguk complained, sometimes by himself and sometimes with fellow employee Cadie, to the Plant Manager and the Time Standards Engineer, claiming that the standards in the G & L department were wrong and "that the employees were entitled to see the construction sheets" (R. 19; Tr. 122).<sup>8</sup> The Company refused to justify the new standards or to show the employees the construction sheets on which they were based, and instead insisted that the quotas were fair and accurate. After 6 weeks of futile protests as an ordinary employee, Kaguk ran for membership on the Employee Committee in order "to have standing to talk to the Company about the G & L Department." (R. 19; Tr. 125). At the very first meeting held after his election, Kaguk introduced a motion to discuss the new standards in the G & L department, complaining that the standard had been raised so much that the employees could not make their bonuses any more (Tr. 101-102, GCX 9(b)). The Chairman of the Employee Committee read a letter written to the Company by

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<sup>8</sup> Even if the standards were correct and the Company had no duty to justify the standards to the employees, Kaguk's protests about the high production quotas are still concerted protected activity within the meaning of Section 7. This Court has held that the mistaken beliefs of employees do not remove their activities from the protection of Section 7. *N.L.R.B. v. McCatron*, 216 F. 2d 212, 215 (C.A. 9), cert. denied, 348 U.S. 943, (employees fired for striking to bring about the reinstatement of another employee whom the strikers mistakenly believed had been fired for Union activity). And see *N.L.R.B. v. Phaostron Instrument & Electronic Co.*, 344 F. 2d 855, 859 (C.A. 9).



Kaguk and a fellow employee in the G & L department, protesting the unfair production quotas, the manner in which they had been arrived at and the refusal of the Company to compromise in any way with the employees about this issue. Petitioner contends (br. pp. 9-10) that the letter referred solely to Kaguk's own standards. Yet, the text of the letter, signed by Kaguk and Cadie,<sup>9</sup> clearly shows that they were speaking for the employees in the G & L department, and that the issue of standards had been "argued back and forth between the employees and the management for approximately the last six weeks." (R.X. 4). After failing to obtain any compromise or satisfaction from President Schott at the meeting, Kaguk decided to try to force the Company to change its stand on the high quotas by seeking support from an outside union. Within 2 days of this unsatisfactory meeting with the Company, Kaguk personally contacted a representative of the IBEW and arranged for a meeting between a union organizer and several employees (R. 20; Tr. 95-96). The employees' major purpose in attending this meeting was to do something about the unfair standards and Kaguk and his fellow workers discussed this very problem with the IBEW representative (R. 20; Tr. 96-98). Several days later, Kaguk had an argument with Time Standards Engineer Mallrich about the Company's refusal to show the employees the con-

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<sup>9</sup> That the writing of this letter by Kaguk and Cadie constituted a protected concerted activity is, we submit, too clear to require extended discussion, as petitioner itself apparently concedes (br. p. 15).

struction sheets on which the new rates was based. Kaguk told Mallrich that when the Union came in, the Company might be more willing to compromise on the new standards (Tr. 110). A few days later, Kaguk received a 5-day disciplinary layoff for arguing with a supervisor about another employee's work assignment to non-bonus work although bonus work was available.

Although the Company contended at the hearing that Kaguk had been fired for violating a company rule prohibiting nonactive employees from visiting the plant during working hours (R. 20),<sup>10</sup> petitioner now argues that Kaguk was really fired because of his constant complaints and his contentious attitude. (Co. brief, pp. 14-15). Yet the above evidence conclusively shows that Kaguk, in engaging in these activities, was acting in behalf of, and speaking for, the employees of the G & L department and not for himself alone. The Company apparently admits that the issue of the new work rates was an inflammatory one which caused widespread employee dissatisfaction. Kaguk complained to management, giving expression to this dissatisfaction in terms of employee

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<sup>10</sup> Petitioner has apparently abandoned this argument, which the Examiner properly rejected (R. 20). Thus, although the Employees' Manual contains a rule prohibiting persons not actively employed from visiting the plant premises without the plant manager's permission, both Kaguk and another employee testified that they had never heard of this rule or its enforcement (R. 20; Tr. 115, 178-179), and the record shows that the rule had not been enforced against other employees who—some with their families—visited the plant during working hours (Tr. 137, 179-180).

rights and demands. Thus, for example, he claimed "that the employees were entitled to see the construction sheets" (R. 19; Tr. 122); that "the employees and management" had argued about the standards for about 6 weeks (R.X. 4); that the Company never offered to take "the standard apart and [show] us why it was set up the way it was . . ." (Tr. 122-123); and that the Company "didn't want to compromise with us." (Tr. 103.) Moreover, Kaguk complained to management about the standards, in concert with another employee, and it was Kaguk who arranged for other employees to meet with an IBEW representative to see what could be done about the unfair rates. Applying the well-established principles of law cited above to the facts of this case, ". . . it is clear that Section 7 protects his right to utter [his grievance] as a matter of concerted activity with other employees for mutual aid," (*N.L.R.B. v. Halsey W. Taylor Co.*, 342 F. 2d 406, 408 (C.A. 6)) and the Company violated Section 8(a)(1) by firing him for engaging in such activity.

## CONCLUSION

For the reasons stated above, we respectfully submit that the petition for review should be denied and that a decree should issue enforcing the Board's order in full.

ARNOLD ORDMAN,  
*General Counsel,*

DOMINICK L. MANOLI,  
*Associate General Counsel,*

MARCEL MALLET-PREVOST,  
*Assistant General Counsel,*

WARREN M. DAVISON,  
MARTIN R. GANZGLASS,  
*Attorneys,*

*National Labor Relations Board.*

January 1966.

## CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

Marcel Mallet-Prevost  
Assistant General Counsel  
National Labor Relations Board

## APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

## RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

## UNFAIR LABOR PRACTICES

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;



## PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: \* \* \*

(c) \* \* \* If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: \* \* \*

\* \* \* \*

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing,



modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record . . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board,

and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

\* \* \* \*

## APPENDIX B

Pursuant to Rule 18(f) of the Rules of the Court.

## GENERAL COUNSEL'S EXHIBITS

<u>No.</u>	<u>Identified</u>	<u>Offered</u>	<u>Rec'd in Evidence</u>
4 "I"	21	40	40
7	33	34	34
8	34	35	35
9-a	36	36	36
9-b	36	36	36
9-c	36	36	36
17	112	112	112

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3-Rule J	322	331	332
4	339	340	340

No. 20275

IN THE

**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

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COUNTY OF VENTURA,

*Appellant,*

*vs.*

O. V. BLACKBURN,

*Appellee.*

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On Appeal From the United States District Court for the  
Southern District of California, Central Division.

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**APPELLEE'S BRIEF.**

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GEORGE R. MAURY,

Suite 910,  
3440 Wilshire Boulevard,  
Los Angeles, Calif. 90005,

*Attorney for Appellee.*

**FILED**

OCT 19 1965

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No. 20275

IN THE

**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

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COUNTY OF VENTURA,

*Appellant,*

*vs.*

O. V. BLACKBURN,

*Appellee.*

---

On Appeal From the United States District Court for the  
Southern District of California, Central Division.

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**APPELLEE'S BRIEF.**

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**Statement of the Case.**

We controvert the Appellant's (hereinafter called the County) Statement of the Case both in the outright statements of fact, and in the emphasis given. Much of it differs from the Findings of Fact, *e.g.*, the County states: "All of the information depicted on the map was taken from public records and governmental sources," (County Br. p. 2, lines 15-17), which differs from the evidence and the findings [R. 162; R. 69-70] thus attempting to subtract from and reduce to miniscule proportions the actual scope of Blackburn's creativity, sources and the originality of his work.

While the word "royalty" was not used by the County's lawyers in drafting the contract, nevertheless, the \$1,900.00 paid was clearly for the *use* of the "dupli-

cates” of the negatives. Moreover, Reporter’s Transcript 71 does *not* say or imply that “all persons who participated in the actual negotiation for the County were dead at the time of trial.” Instead, it refers to a time about 1950, and what County personnel negotiated from then to 1956 does not appear. We here note that the particular County lawyer who drew the contract was *not* produced by the County.

True, too, the specific matter of copyright notices, in those words, was not mentioned. But all persons involved *saw* the notices [Exs. 2-A to 2-I, inc.] on the negatives [Find. IX, R. 163] and the only rights to copy granted by the contract [Ex. 1] were “the right to obtain *duplicate* tracings on linen from the photographic negatives,” and “the right to reproduce from said *duplicate* tracings any and all maps necessary for County use,” and “to sell prints of said *duplicate* tracings to the public . . .”

Blackburn not only “testified that the negatives provided . . . did contain copyright notices”, but he *demonstrated* it by a showing of the negatives [Pltf. Exs. 2-A to 2-H, inc.]. These were admitted into evidence as Exhibits 2-A to 2-I, inc., R. Tr. p. 23; and replaced by blueprints [R. Tr. p. 45].

Witness Renie testified as to the value of the *copyright* [R. Tr. pp. 81-82] not the value of the “map prior to the agreement” (County Br. p. 4, lines 7-10).

The statement (County Br. p. 5, lines 6-13) is a strained and erroneous interpretation of the Court’s rul-

ing. True, no witness had been on the stand, and hence it can be literally (and most narrowly) stated that “before the taking of testimony, the Court held as matter of law that the map was copyrightable.” Reporter’s Transcript, pages 8-9 is cited. This interpretation by the County omits the context on page 7, to say *nothing* of the evidence [R. 69, Answers to Interrogatories] of the work done producing the map, and again in misstating the lower court’s (obviously tentative) statement (by no means a “holding”)— “but you did not buy the right to destroy his copyright.” The Judge was merely voicing generalities with a view to orienting his mind to the trial of the case before him.

For reasons such as the foregoing, and to avoid, if possible, on our part, a tediously detailed picking apart of the County’s Brief, we respectfully cite to the Court the rule that every intendment, on appeal, is to be resolved in favor of the judgment of the lower court.

*Townsend v. Jemison*, 48 U.S. 706, 7 How. 706,  
12 L. Ed. 880;

*Bowley v. Griswold*, 87 U.S. 486, 20 Wall. 486,  
22 L. Ed. 375;

*Hardt v. Kirkpatrick* (9 Cir. 1937), 91 F. 2d  
875, cer. den. 58 S. Ct. 762; 303 U.S. 626,  
82 L. Ed. 1088.

This is a copyright infringement case and there is no question but that the defendant has directly copied, published and sold—for years—copies of plaintiff’s map without the statutory notices affixed.



## Originality.

As almost always, the accused culprit urges want of originality.

Disregarding, with barefaced, unabashed abandon, its own lawyer's contract (the subject [R. 100, line 13] of which [Ex. 1] is a map "copyrighted, compiled and published by O. V. Blackburn"), the County attempts to support its claim of lack of originality, not only by a belittlement of the plaintiff's work, but also by an out-of-context, oblique gesture towards the trial judge (County's Br. pp. 8-11). The judge, in his comments [R. Tr. pp. 6-9] was using an example—trying to find the city of Oak View in Ventura County—to show the difficulty of the work of making a map. His were illustrative remarks and were by no means the basis of his ruling on the issue. Quite patently, he had thoroughly read both the Pre-Trial Conference Order and the Interrogatories and all answers thereto [R. 69, Answer to Interrogatory No. 25]. From that and the pre-trial stipulated facts [R. 144, Par. F], the originality is clear and the judge obviously had all that in mind.

To County's argument that Blackburn only used "public domain" sources (County's Br. p. 11), the obvious answers are:

(1) *All* maps, in essence, must be assembled, collated, prepared and compiled from information from the "public domain" since they depict and represent parts of the world.

(2) This is no barrier to their being copyrightable. The "originality" requirement for copyrightability in our law is not onerous. In *Alfred Bell & Co. v. Catalda*

*Fine Arts, Inc.* (2 Cir. 1951), 191 F. 2d 99, 102-103, Judge Frank, for a unanimous court, said:

"It is clear, then, that nothing in the Constitution commands that copyrighted matter be strikingly unique or novel. Accordingly, we were not ignoring the Constitution when we stated that a 'copy of something in the public domain' will support a copyright if it is a 'distinguishable variation'; or when we rejected the contention that 'like a patent, a copyrighted work must be not only original, but new', adding, 'That is not . . . the law as is obvious in the case of maps or compendia, where later works will necessarily be anticipated.' All that is needed to satisfy both the Constitution and the statute is that the 'author' contributed something more than a 'merely trivial' variation, something recognizably 'his own.' Originality in this context means little more than a prohibition of actual copying."

See also:

*Trowler v. Phillips*, 260 F. 2d 924 (9 Cir., 1958).

(3) Even the "direct observation" requirement of *Amsterdam v. Triangle Publications*, 189 F. 2d 104 (relied on by County) has been met:

"I started the creation of Blackburn's Map of Ventura County in 1938. The map was made at 600 ft. scale. It had to be drawn, scaled with a great degree of accuracy and was considered fine. After the map was drawn, and after many months of drafting and making the map, other things such as roads, canals, etc., had to be placed on the map. A large percentage of the roads and streets were taken from government maps. Identification

of owners and parcels were taken from the Ventura County Assessor's records by me and were compiled personally by me. In addition, there were rivers, the Santa Clara River, for instance, was taken from aerial photographs of the U. S. Government maps, and canyons, creeks, drainage channels from government maps. In addition to making the map originally and checking up various legal descriptions of boundaries of cities, etc., they did not agree with photographic information I had and *which I had found were incorrect on the Ventura County maps and afterwards submitted five or more of these discrepancies of the county's surveyor. It is my understanding that the Board of Supervisors took action to make these corrections that I submitted.*" (Our Emphasis) [R. Tr. p. 69, line 20, to p. 70, line 5].

It is quite obvious, thus, that plaintiff both made the map originally, and then checked the photographic and public domain information he had acquired against the actual boundaries, and had found the "public domain" material in error.

This first argument of the County is, in essence, an attack upon the findings of fact [No. VII, R. 162] and if there is any substantial evidence to support it, as we believe we have demonstrated, the finding should not be disturbed upon appeal.

As to copyrightability, see:

*Hammond v. International*, 210 F. Supp. 206;  
*Marken & Beilfield, Inc. v. Baughman Co.*, 162  
F. Supp. 303;  
*Emerson v. Davies*, 8 Fed. Case 615, 619.

The unfair stringency of the “direct observation” rule (*Amsterdam v. Triangle Publications*, 189 F. 2d 104 urged by County) is severely criticised by Professor Melville Nimmer on page 82 of his treatise on copyrights as follows:

“The fallacy of the direct-observation rule stems from the Amsterdam Court’s misunderstanding of the copyright concept of originality. The court proceeded from the undoubted premise that ‘To be copyrightable a map must be the result of some original work’ to the false conclusion that ‘original work’ somehow requires direct observation. The Amsterdam court cited *Andrews v. Guenther*, [60 F2d 555 (S.D.N.Y. 1932)] as authority for the direct-observation rule. Yet, the Andrews case, although somewhat ambiguous, merely held that no copyright may be claimed in the absence of both direct observation and originality in selection of public domain materials (See §18.31) and indeed recognized that there may be copyright protection for a map as a compilation where there is a modicum of creative selection as distinguished from mere copying.

“Subsequent to the Amsterdam opinion, the direct-observation rule seems to have been rejected in *C. S. Hammond & Co. v. International Globe, Inc.* [210 F.Supp. 206 (S.D.N.Y. 1962)] in which the Court found sufficient originality to support a copyright in the exercise of judgment in the selection of particular place names from prior works. The validity of the direct-observation rule as applied to maps was briefed and argued in *Trowler v. Phillips* [260 F2d 924 (9th Cir. 1958)].

However, although the Court of Appeals reversed the summary judgment which had been granted by the district court in reliance on the direct-observation rule, the opinion does not squarely deal with this issue. Nevertheless, the following passage from the Trowler opinion suggests a departure from the direct-observation rule:

‘We believe it fair to say that his [appellant’s] account of preparing the Hesperia maps lists quite a little work done by him in preparing the map. His source material, he says, included recorded tract sheets of the Hesperia area, many sheets of the San Bernardino County road system, a county map, Dept. of Interior maps, state highway maps and Santa Fe railroad maps. He tells of problems of tying the maps together, adjustment of scales, elimination of much material from the source. He made some additions of landmarks from personal observation. Further, he says he straightened out street names.’ ”

And, so, while academically we, too, feel that the direct-observation rule is fallacious, nevertheless, the evidence here, either by applying or not applying the direct-observation rule, we submit, conclusively refutes any criticism leveled at plaintiff’s originality.

## **The County’s Duties.**

### **A. The Implied Covenant.**

We here first analyze and summarize the contract [Ex. 1, in Evidence, R. Tr. p. 17, Ex. A attached to Complaint, R. 5-6], the basic document in controversy:

*The Parties thereto:* Plaintiff, copyright and map proprietor; Defendant, County.

*Recitals therein:*

1. Plaintiff is the proprietor of a certain map of Ventura County, California, titled "Blackburn's Map of Ventura County, *copyrighted*, compiled and published by O. V. Blackburn."

2. County desires to obtain a *duplicate* tracing of said map, together with the right to reproduce said map for use by the County Surveyor and for sale to the public.

*The Words of Grant:*

Blackburn grants and sells:

1. The right to obtain *duplicate tracings* on linen from Blackburn's negatives.

2. The right to reproduce from the *duplicate tracings* any and all maps necessary for County use.

3. The right to sell prints of the *duplicate tracings* at prices determined by the County.

*Conditions:*

1. County to bear expense of making the *duplicate tracings*.

2. The *duplicate tracings* to become property of the County.

*Restrictions:*

None whatever on Blackburn's right to sell reproductions of his map to the public in Ventura County or elsewhere.

This writing, as shown above, clearly grants certain definitive rights in a copyrighted work. The designation "Titled 'Blackburn's Map of Ventura County,



*copyrighted*, compiled and published . . .” can mean only that the draftsman of the contract [an official Ventura County employed District Attorney, R. 36-37, Answers to Interrogatories 2 and 3] *contemplated* a copyrighted work.

This is further borne out by the other language of the instrument whereby it specifically grants *rights* and in one place only does it mention full or any title in the Grantee County, namely, “Upon completion said *duplicate tracings* shall be the property of County.” (N. B. Only the right to *duplicate* tracings is sold. Had they been *duplicates*, in fact, they would have included Blackburn’s copyright notices [Exs. 2A-2H, inc.]).

The *consideration* (\$1,900.00) is “for the rights herein granted and sold.” Obviously for no others.

In its point numbered II (County Br. p. 12, *et seq.*) the County continues its attempted implication derogatory to the trial judge, where it says: “at the commencement of the trial, and prior to the taking of testimony . . .” The intendment sought, *i.e.*, that the trial judge prejudged the case, we again categorically deny and, we believe, completely refute. The judge, as again we point out, “at the commencement of the trial, and prior to the taking of testimony,” was fully familiar with the contract, and quite obviously had fully prepared for the trial by a thorough study of all pre-trial documents, and was readily conversant with the results of all the discovery procedures [See R. Tr. p. 5, lines 21-24; p. 10, lines 1-26].

It is true that the contract contains no mention of copyright notices, *per se*, and that such notices had never been discussed. However, at this point, the Coun-

ty now conveniently forgets its earlier position, stated at Reporter's Transcript, page 12, lines 1-5:

"Mr. Ashby: We take the position that we made a tracing of his negative and if our tracings do not have the copyright notice on it, it is not because we removed it, it is because it wasn't on the negative or it was blocked out by Mr. Blackburn."

That such position was completely erroneous as a matter of fact, is borne out by all the evidence on the subject: see Exhibits 2-A to 2-I, inclusive; the testimony of Blackburn (utterly unanswered and undenied) at Reporter's Transcript, page 19, lines 5-8, 14-15; page 21, line 23, to page 22, line 8; page 22, lines 18-23; page 24, line 14, to page 36, line 14; completely refutes the County's first stated position. All the evidence establishes the existence of the notices on the negatives.

Who removed the notices or so traced the negatives on the linen that they had no notices (*i.e.*, were not true duplicates) is really quite clear, too. The negatives were taken away by Rice, the County's man [R. Tr. p. 20, line 24] and returned by him a week or two later still bearing notices, except the two which had been mutilated [R. Tr. p. 21, lines 19-25; p. 22, lines 1-25; concerning this mutilation of two negatives, see R. Tr. pp. 25-29, inc.].

The notices were never placed on the eight "duplicate" tracings which the County had purchased [R. Tr. p. 99, lines 12-14] from Read & Co.

So it is quite obvious that in the process at Read & Co., such changes were made that the tracings never bore any notices. They were not *duplicates*.

Read & Co. was hired and paid by the County [Deft. Ex. 4; R. 105, Ex. H, attached to Answers to Interrogatories].

So the onus must lie on the County for the absence of notices on the linen tracings made for County by Read & Co.

This, we believe, brings us to the very heart and core of the liability phase of this case:

*Under Both the Contracts and the Law, the County Was Obligated to Put the Notices on the Copies of the Tracings Made by It Both for County Use and for Sale, and Failure to Do so Constituted Infringement.*

This contention is based on the doctrine of implied covenants in a license.

County argues that Blackburn “forfeited” his copy-right under a doctrine announced by the Hon. Learned Hand in the case of *National Comics Publications v. Fawcett Publications*, 191 F. 2d 594 (2 Cir. 1951).

A reading of that decision reveals, first, that the facts are not recited by Justice Hand (for he says, p. 597): “The opinion and decision of the district court is reported in 93 F.Supp. 349, and we shall not repeat the substance of the controversy which is there stated or the facts found.” and, second, that the doctrine urged was dependent entirely upon a hypothetical assumption as to what might have been the terms of a contract not then before the Court. At page 600, we find:

“Although the judge did not find the terms of the agreement under which they were borrowed, we must suppose that there was one; and at best ‘Mc-

Clure' could have become no more than a licensee, for it is not suggested that 'Detective' transferred the copyrights in them. The question is whether the absence of the imperfection of the notices on these 'strips' 'forfeited' their copyrights, when they were published in the 'syndicated' newspapers. The answer depends upon the terms of the contract of borrowing. Section 10 provides that the first publication on a 'work' with the 'required' notice secured the copyright; but it implies that a failure to affix the notice upon each copy, later published 'by authority of the copyright proprietor,' will 'forfeit' it; and such is the law. If 'Detective' gave 'McClure' an unconditional license to publish the 'strips,' their publication without the 'required' notice was 'by authority of the copyright proprietor', and had the same effect upon the copyrights that similar publication by 'Detective' would have had: it 'forfeited' them unless §21 saved them. On the other hand, if 'McClure' promised to affix the 'required' notice upon the borrowed 'strips'—as it did upon the 'strips' made under the contract—the performance of that contract was a condition upon the license, for 'Detective' certainly did not mean to be remitted only to the inadequate remedy of an action for damages for breach of the promise. The decision of the Seventh Circuit in *American Press Association v. Daily Story Publishing Co.*, 120 F. 766, supports this interpretation of such a contract, and we regard it as unanswerable. 'Detective' may indeed have waived the performance of such a promise, if one was made, but the judge made no finding on the mat-

ter, and we leave the issue open, except to say that the exchange of letters between 'Detective' and 'McClure' in August, 1940, would not support a finding of waiver."

That case was remanded to find out what the contract said. Here, the contract is very much before the Court.

And so, in this case, we submit, if any "forfeiture" occurred, it was a forfeiture to the public domain. This, of course, must have been caused by the defendant's wrongfully failing to put the notice on the maps.

There is no question but that Rice, the County Surveyor, knew of the notices [R. Tr. p. 36, line 25, to p. 36, line 1; p. 66, lines 16-32; p. 67, line 1].

In *Chapel & Co., Inc. v. Costa, et al.*, 45 F. Supp. 554, we find:

"It has been stated repeatedly that after notice of copyright has been published everyone is under the duty to learn the facts concerning the copyright and copies at his peril (citing) and that the question of defendants knowledge of plaintiff's copyright does not enter the consideration upon the issue of infringement."

Here we have the fact that the contract was prepared by the County's legal staff [R. Tr. p. 36, line 11, to p. 37, line 3].

In this circuit, this situation, we submit, is governed by the doctrine stated in *Warner Bros. v. Columbia Broadcasting*, 216 F. 2d 945, 949 (9 Cir. 1954), which holds:

"The instruments under which Warner claims were prepared by Warner Bros. Corporation, which

is a large, experienced moving picture producer. It would seem proper, therefore, to construe the instruments under the assumption that the claimant knew what it wanted and that in defining the items in the instruments which it desired and intended to take, it included all of the items it was contracting to take. . . .

\* \* \*

“As was said in *Phillip v. Jerome H. Remick & Co.*, S.D.N.Y., Op. No. 9,999, 1936, ‘Such doubt as there is should be resolved in favor of the composer. The clearest language is necessary to divest the author of the fruits of his labor. Such language is lacking here.’ See, also, *Tobani v. Carl Fischer, Inc.*, 1942, 263 App. Div. 503, 507, 33 N.Y.S.2d 294, 299, affirmed 1942, 289 N.Y. 727, 46 N.E.2d 347.”

To interpolate in a manner which we believe perfectly fits this case:

It would seem proper, therefore, that the lower court construed the instrument under the assumption that the County knew what it wanted, and that in defining the rights in the instrument which it desired and intended to take, it included *all* of the rights which it was contracting to buy, and that its legal staff knew more about contracts than did Blackburn.

Since only “*duplicates*” were to become subjects of the County’s usage, these, to give the word its ordinary meaning, clearly must have contained Blackburn’s Notice of Copyright if the originals did. No right was granted to use or sell ought but a *duplicate*.



Thus, when County commenced publishing, using and selling maps *without* the notice, it clearly exercised rights not granted and to which it was not entitled, and thus infringed the copyright.

The Supreme Court, in *Manners v. Morosco*, 252 U.S. 317, 327, 64 L. Ed. 590, 594, says:

As was said by Judge Hough in a similar case:

“There is implied a negative covenant on the part of the . . . [grantor] not to use the ungranted portion of the copyright estate to the detriment, if not destruction, of the licensee’s estate. Admittedly if Harper Brothers (or Klaw and Erlanger, for the matter of that) permitted photo plays of Ben-Hur to infest the country, the market for the spoken play would be greatly impaired, if not destroyed.’ *Harper Bros. v. Klaw*, 232 Fed. 609, 613.”

See also:

*Kirk La Shelle v. Paul Armstrong*, 263 N.Y. 79, 188 N.E. 163;

*Uproar, etc., v. N.B.C.*, 81 F. 2d 373, 377.

By such selling and using without notice, the County has violated that negative covenant.

The intention of the infringer is immaterial if the infringement appears and the lack of intent does not excuse liability.

*Metro. v. Webster*, 117 F. Supp. 224, 231;

*Tackvig v. Bruce*, 181 F. 2d 664, 666;

*DeCosta v. Burn*, 146 F.2d 408, 411;

*Advertisers Exchange v. Hinkley*, 101 F. Supp. 801; Affirmed 199 F. 2d 313; Cert. Den. 344 U.S. 921, 73 S. Ct. 388, 97 L. Ed. 710.

Implied covenants of good faith have been sustained as to grantors in many cases.

*Kirk LaShelle Co. v. Paul Armstrong*, 263 N.Y. 79, 188 N.E. 163;

*Uproar Co. v. N.B.C.*, 81 F. 2d 373.

These hold

“that in every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing (citing *Kirk LaShelle*, above). See, too, *Manners v. Morosco*, 252 U.S. 317, 40 S. Ct. 335, 64 L. Ed. 590.”

As to grantees also, such implied covenants have been enforced:

*McCord v. Broadcast Music, Inc.*, 89 N.Y.S. 2d 727;

*Underhill v. Schenck*, 238 N.Y. 7, 143 N.E. 773;

*In re Watterson, Berlin & Snyder*, 48 F. 2d 704 (2 Cir. 1931);

*Arnold Prod. v. Favorite Film*, 298 F. 2d 540 (2 Cir. 1962).

Whenever the Grantor reserves any rights in the work, [and] there is absent a clearly expressed intent to the contrary (*Metro Associated Services, Inc. v. Webster City Graphs, Inc.*, 117 F. Supp. 224). [there is] an implied covenant by the Grantee that he will in the course of exercising his rights under the grant protect the rights reserved to the grantor by

taking whatever steps are necessary to preserve the copyright in the work.

*April Productions, Inc., v. G. Schirmer, Inc.*,  
308 N.Y. 366, 126 N.E. 2d 283;

See *Johnston v. 20th Century Fox*, 82 Cal. App. 2d 796, 187 P. 2d 474, where it is said:

“Appellant was perfectly willing to take the exclusive use of the title without any express obligation on the part of respondents to refrain from letting the book fall into the public domain, as by publishing it without the statutory notice of copyright, or by assigning the copyright to a bona fide purchaser for value. Appellant bargained for use of the title only, with the exclusive right to use it as the title of motion pictures, stage performances, radio broadcasts, television broadcasts, and any use whatever throughout the world, except the right in respondents to continue to use it in connection with the publication of the book for so long as such rights existed under the law. Appellant got just what it bargained for. It cannot complain because it did not get more.”

Another case supporting the implied covenant doctrine is:

*Capitol Records, Inc. v. Mercury Records Corp.*, 221 F. 2d 657 (2 Cir. 1955) which holds that under New York law, the owner of a literary property may, by a negative covenant, subject the use of literary property to restrictions in the hands of a remote assignee. We cite this merely to illustrate how far the courts have gone to protect the proprietor of a copyrightable work.

We, therefore, urge that the trial judge did not err in sustaining the implied covenant.

**B. The County's Legal Obligation.**

The statute (17 U.S.C.A. §10) is correctly quoted by the County (County Br. p. 17) and, we submit, means just what it says:

“ . . . and such notice *shall* be affixed to each copy thereof published or offered for sale . . . by authority of the copyright proprietor . . . ”

And, if not so affixed, the copyright value is destroyed.

*Mifflin v. Dutton*, 190 U.S. 265, 23 S. Ct. 771, 47 L. Ed. 1043.

That has been the consequence of the defendant's conduct here. The County, by its argument on this question, is failing to see the woods because of the trees (County Br. p. 17). If a copyright be destroyed, it is no longer secured. Hence, it is a mandatory duty imposed by §10 upon the County (which published and sold under the authority of Blackburn) to affix the notice in order to secure Blackburn's copyright.

The quotation from Justice Hand's decision in the *National Comics* case (191 F. 2d 594) is not, we submit, properly amenable to the interpretation sought to be invoked by the County. That case is obviously the only one where any concept of “exacting” a promise to affix is mentioned, and since there, the contract under the court's scrutiny was completely hypothetical, we submit that this case is, as the lower court held, governed by the other doctrines which we have endeavored to point out.

*Dejonge & Co. v. Breuker & Kessler Co.*, 235 U.S. 33, 35 S. Ct. 6, 59 L. Ed. 113, is authority (contrary to the County's assertion) that "every reproduction of a copyrighted work must bear the statutory notice."

In *Deward & Rich v. Bristol Savings & Loan Corp.*, 120 F. 2d 537, the Court in upholding the statutory duty to affix notices says:

"We know of no decision contrary to this holding, nor does the fact that the defendant first secured the copyrighted book 'A' through a contract paying the plaintiff for the use, change the rule. *Thompson v. Hubbard*, 131 U.S. 123, 9 S. Ct. 710, 33 L.Ed. 76."

The *Thompson* case is clear authority that:

"It is not enough that Thompson, while he owned the copyright, gave the required notice in the copies of every edition he published, while it was his copyright. The inhibition of the statute extended to and operated upon Hubbard while he owned the copyright, in respect to the copies of every edition which he published, and for his failure he is debarred from maintaining his action."

From all of the foregoing, we respectfully submit that the County, both under the implied covenant and under the statute had the positive duty to affix the copyright notices upon its "duplicate" linen tracings and all later copies, and, that having failed to do so, it is liable for the resulting damages.

### The Damages.

County questions the evidence as to the proximate cause of the loss in value of the copyright, so we here quote the Record verbatim [R. Tr. p. 82, *et seq.*]:

[Mr. Maury] "Q. All right. What would the effect of those assumed facts be upon the value of the copyright?

[Mr. Renie] "A. Well, were I publishing the map without a copyright notice it returns it to the public domain, it completely wipes out his copyright and ownership and value. Whenever a copyrighted map is sold or distributed, or part of it, without a copyright notice on it, it becomes public property and any big firm can send it down to their copy department and make all the copies they want for nothing without any danger of infringement.

Q. Then it is your opinion that the copyright had no value at all after all this happened, if it did?

A. Not a bit of value. Otherwise, if he put the copyright on, by selling the map the County would then have it on, the customer would see the copyright notice and the name on there, and buy copies from Mr. Blackburn. That is the way I have always figured too. I have sold tracings to Los Angeles County under the same conditions."

Mr. Blackburn stated [R. Tr. 73, lines 21-25]:

"Q. Don't you believe that the value of your copyright would be more if there had not been sold by you the right to reproduce the map itself and sell it to other persons? A. By leaving the copyright sign off it decreased the value of course. It isn't worth anything now."



We do not urge an intended misquotation of the record by our opponents; their ardency for their cause is admirable.

The statute on damages is 17 U.S.C. 101, and in part reads:

“§101. Infringement

If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

. . .

(b) *Damages and profits; amount; other remedies*—To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits . . .”

Thus, two elements are readily apparent which *may* be the elements of damages: (1) the actual damages “as well as (2) all the profits . . .”

The subject of damages was thoroughly discussed in *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F. 2d 354 (9 Cir. 1947) by this Court:

“ . . . In the instant case Bruckman received no profits, but this does not relieve him from liability for the damages sustained by the appellee for his deliberate misappropriation of the appellee’s property as a writer and director. The case of *Washingtonian Publishing Co. v. Pearson*, 78 U.S.App. D. C. 287, 140 F2d 465, relied upon by Bruckman to the effect that authors are not liable for profits which other infringers derive from the infringement, discusses profits only. There is no merit in the contention that Bruckman is not con-

nected or in any way responsible for the infringements, i.e., the public showing of the alleged infringing film. He presents no authority to support his view that he is not liable for damages as a contributory infringer.

. . .

“Appellant—Universal presents several points in opposition to the court’s award of damages: (1) The assessment of \$40,000 is based on speculation and conjecture rather than facts; (2) the testimony of the appellee’s president, Mr. Harold Lloyd, and two alleged experts of what the profits would be on the re-issue or re-make of the plaintiff’s motion picture cannot support the court’s award of damages; (3) there can be no recovery of profits of a new and untried venture, there being no provable data of past business to use as a basis for anticipated profits; (4) there is no evidence of any market value on the re-issue and re-make rights; (5) statutory damages may not be awarded where actual damages or profits are shown; (6) damages should not exceed \$5,000 where there is no knowledge of infringement. Appellant-Bruckman alleges that no damage is proved since there was no data to prove damage and the damages awarded were based on conjecture.

“The court found ‘That by reason of said infringement by defendants and each of them upon plaintiff’s copyright, the Court finds that plaintiff has been damaged by defendants and each of them in the sum of \$40,000.00 . . .

\* \* \* \*

“The Court further finds that plaintiff’s rights to reissue and remake said motion picture photoplay entitled ‘Movie Crazy’ were substantially damaged and impaired by reason of said infringing acts of defendants but that the extent to which said rights were impaired and damaged did not and does not exceed the sum of \$40,000.00.

\* \* \* \*

...

“The authorities support the doctrine that uncertainty as to the amount and extent of damage will not deprive the appellee of his recovery. In *Sinclair Refining Co. v. Jenkins Petroleum Process Co.*, 289 U.S. 689, 697, 53 S.Ct. 736, 739, 77 L.Ed. 1449, 88 A.L.R. 496, the court discusses a patent infringement in which it says, in part, ‘A patent is a thing unique. There can be no contemporaneous sales to express the market value of an invention that derives from its novelty its patentable quality. . . . But the absence of market value does not mean that the offender shall go quit of liability altogether. The law will make the best appraisal that it can, summoning to its service whatever aids it can command. . . . [Cases cited.] At times the only evidence available may be that supplied by testimony of experts as to the state of the art, the character of the improvement, and the probable increase of efficiency or saving of expense.’ At page 699 of 289 U.S. at page 39 of 53 S.Ct. ‘Value for exchange is not the only value known to the law of damages. There are times when heed must be given to value for use, if reparation is to be adequate. ‘. . . the market test fail-

ing, there must be reference to the values inherent in the thing itself, whether for use or for exchange.'

\* \* \* \*

. . .

"See *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 66 S.Ct. 574, 580, 90 L.Ed. 652, in which it is said: 'The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. . . .

" 'The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery' for a proven invasion of the plaintiff's rights. [Cases cited.]

\* \* \* \*

. . .

"We are of the opinion that there is substantial evidence in the case to show that property rights and present existing intrinsic property values have been impaired or destroyed. The testimony of the expert witnesses clearly establishes that the picture's value has been lessened by the appropriation of an important sequence by the appellants, and it is common knowledge that the repeated use of comedy detracts from its force as amusement. The appellants object to the admission of expert testimony to show the value of the plaintiff's (appellee's) property and yet at the same time make use of alleged experts to sustain their position that the motion picture belonging to appellee had no

value. Lloyd, president of the appellee corporation, as well as appellee's other witness, were found qualified to render testimony as to the value of appellee's motion picture before and after the misappropriation of the sequence in question."

In *Paramore v. Mack Sennett*, 9 F. 2d 66 (D.C.S.D. Cal., 1925) the late Judge James found damages to be "found entirely by fixing a sale value on the scenario." (p. 68.)

In the District Court decision of *Szekely v. Eagle Lion Films*, 140 F. Supp. 843, 849, it is said:

"The law is clear that where a person is entitled to a judgment for the destruction of a legally protected interest in property, damages include 'the exchange value of the subject matter or the plaintiff's interest therein at the time and place of the conversion or destruction, or a different value where that is necessary to give just compensation,' Restatement of the Law, Torts §927.

"The word 'value' when used in the Restatement may mean either market value, or 'value to the owner.' (p. 849)"

In the Appellate Court's decision in that case (*Szekely v. Eagle Lion Films*, 242 F. 2d 266) affirming the District Court, the Court holds (p. 269):

"This is not a case where there was no market for plaintiff's property. Geiger, even if financially embarrassed, had a property salable in conjunction with plaintiff's. The two together had a substantial value, as proved by the terms of acquisition of the territorial rights by Eagle Lion. Until Eagle Lion distributed the film, plaintiff's rights were

part of a salable bundle. When Eagle Lion distributed the film, in violation of plaintiff's rights, the market ended. The legal injury is certain. We should not allow difficulty in ascertaining precisely the value of the right destroyed, which difficulty arises largely from the destruction, to enable the infringer to escape without compensating the owner of the right."

Blackburn had spent some \$7,500.00 in creating the maps [R. Tr. p. 50, line 8]; and in his opinion, the reasonable value of the copyright as distinguished from the map—an entirely separate commodity—[17 U.S.C. §27] was about \$15,000.00 in 1956.

Jack Renie, the fully qualified successful expert of nearly fifty years' experience in the cartographic field, and the owner of the largest map store in the United States, gave his considered opinion [and he knew the maps under discussion—R. Tr. p. 77, line 22] that Blackburn's copyright had a value in July, 1956, of "between \$15,000.00 to \$20,000.00." [R. Tr. p. 79, lines 19-20] and that this was *destroyed* by the facts narrated and assumed by him from the hypothetical question put [R. Tr. pp. 80-83].

The Court gave due credit to the defendant for the \$1,900.00 paid by it for the rights granted by the contract [R. Tr. p. 111, lines 21-22] with the resultant judgment.

The County's argument (County Br. pp. 26, *et seq.*) and particularly its argument that other causes for the destruction of Blackburn's copyright's value are effectively in the record, is simply an argument that the trial court should be reversed as to a *finding of*



*fact*. This, we believe, would be a practice contrary to established appellate principles, given substantial evidence to support the finding.

*Fidelity & Casualty of N. Y. v. Griner* (9 Cir.),  
44 F. 2d 706;

*Bogan v. Hynes* (9 Cir.), 65 F. 2d 524, cer.  
den. 290 U.S. 690;

*Palmer v. Aeolian Co.*, 46 F. 2d 746, cer. den.  
283 U.S. 851.

And even if this were not so, the County, actually, had no right, either, to alter Blackburn's map. It only had the right "to reproduce and sell *duplicates*"—Exhibit 1.

*Any* deviation was beyond the scope of the rights granted by the contract, so here, the County is simply trying to take advantage of its own further wrong.

In closing, we quote from the California Supreme Court's decision (which cites with full recognition as the law the *Universal v. Harold Lloyd*, *supra*, decision) in the case of *Golding v. R.K.O. Pictures, Inc.*, 35 Cal. 2d 690 (221 P. 2d 95), at pages 700-701 of the California Reports:

"In support of the appellants' contention that there is not sufficient evidence of the value of the damages sustained by the authors of the play, it is argued that all of the evidence concerning the value of the motion picture rights is found in the testimony of the respondents, no person with experience in the determination of the value of such property being called to testify on their behalf. But the testimony of Faulkner, who stated his opinion in regard to the value of the play, was not neces-

sary as an expert for both he and his coauthor testified as owners of the property. Each of them told the jury that the value of the play before the infringement was between \$25,000 and \$50,000 and that it had no value after the production and distribution of the picture. It is a well recognized rule that the owner of property is competent to testify as to its worth. (10 Cal. Jur. 1023.) 'Literary property is not distinguished from other personal property and is subject to the same rules and is likewise protected. *Palmer v. DeWitt*, 47 N.Y. 532, 538; 7 Am.Rep. 480. California has held that plaintiffs may testify to the value of an unpublished manuscript prior to misappropriation in *Barsha v. Metro-Goldwyn-Mayer*, 32 CA2d 556, 90 P2d 371.' (*Universal Pictures Co. v. Harold Lloyd Corp.*, 167 F2d 354.) The testimony of the appellants' experts that the play contained no material of value for motion picture purposes merely created a conflict in the evidence."

It is submitted that the judgment should be affirmed, and that, under 17 U.S.C. §116, and *Marks Music Corp. v. Continental Record Co.*, 222 F. 2d 488, in its discretion, this Court should award attorney's fees for defense of this appeal; and that \$2000.00 (approximately 15 percent of the judgment), would be a reasonable award.

Respectfully submitted,

GEORGE R. MAURY,  
*Attorney for Appellee.*



### **Certificate.**

I certify that in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing Brief is in full compliance with those Rules.

GEORGE R. MAURY



IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

COUNTY OF VENTURA  
APPELLANT,

v.

O. V. BLACKBURN  
APPELLEE

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

---

BRIEF FOR APPELLANT

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**FILED**

WOODRUFF J. DEEM  
District Attorney

SEP 24 1965

HERBERT L. ASHBY  
Assistant District Attorney

FRANK H. SCHMID, CLERK

KARL H. BERTELSEN  
Deputy District Attorney

County of Ventura  
Courthouse  
Ventura, California

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No. 20775

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WOODRUFF J. DEEM  
District Attorney

HERBERT L. ASHBY  
Assistant District Attorney

KARL H. BERTILSEN  
Deputy District Attorney

County of Ventura  
Courthouse  
Ventura, California

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1 IN THE UNITED STATES COURT OF APPEALS  
2 FOR THE NINTH CIRCUIT

3  
4 No. 20275

5 COUNTY OF VENTURA, APPELLANT

6 v.

7 O. V. BLACKBURN, APPELLEE

8  
9 ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

10  
11 BRIEF FOR APPELLANT

12  
13 JURISDICTIONAL STATEMENT

14 This is an appeal from a final judgment entered on  
15 May 17, 1965, by the United States District Court for the  
16 Southern District of California, Central Division, awarding  
17 O. V. Blackburn thirteen thousand one hundred dollars (\$13,100  
18 damages from the County of Ventura for the infringement of a  
19 copyright in a map (R. 168-169). The underlying action was  
20 brought by O. V. Blackburn to recover damages and to obtain  
21 an injunction for copyright infringement. The District Court  
22 jurisdiction was invoked under 28 U.S.C. 1338 and 17 U.S.C.  
23 101 (R. 2, 142, 160). The District Court held that O. V.  
24 Blackburn had a copyright in the map under the laws of the  
25 United States and that the County of Ventura had infringed  
26 that copyright by failing to affix a notice of Blackburn's





1 copyright to copies of the map reproduced by the County under  
2 an agreement with Blackburn (R. 164-165). Injunctive relief  
3 was denied (R. 166). A final judgment awarding damages to  
4 Blackburn was entered on May 17, 1965 (R. 168). The County  
5 of Ventura on June 11, 1965, filed a timely notice of appeal  
6 under 28 U.S.C. 2107 and 28 U.S.C. 1291 (R. 170). This  
7 Court's jurisdiction accordingly rests upon 28 U.S.C. 1291.

#### 8 STATEMENT OF THE CASE

9 This is a suit brought by O. V. Blackburn to obtain  
10 an injunction and to recover damages for the infringement of  
11 a copyright in a map under section 101 of the Copyright Act.  
12 17 U.S.C. 101.

13 O. V. Blackburn at some time prior to 1954 compiled  
14 and drafted a map of the southern part of the territory of  
15 Ventura County, California. All of the information depicted  
16 on the map was taken from public records and governmental  
17 sources (R. 144-145). In 1954 Blackburn published copies of  
18 the map with copyright notices affixed and thereby claimed  
19 protection of the Copyright Act. 17 U.S.C. 1, et seq.

20 On July 17, 1956, Blackburn and the County of Ven-  
21 tura entered into a written agreement under which Blackburn  
22 sold to the County of Ventura for the sum of one thousand  
23 nine hundred dollars (\$1,900) the right to reproduce copies  
24 of the map for its own use and for sale to the public at any  
25 price determined by the County (R. 5-6; P.Ex. 1; set out in  
26 full in appendix of this brief). Blackburn reserved the right



1 to continue to reproduce the map himself for sale. The agree-  
2 ment contained no provision for the payment of royalties of  
3 any kind to Blackburn on sales by the County or for the affix-  
4 ing of copyright notices on maps sold. The agreement was ne-  
5 gotiated with Blackburn by the County Surveyor (R. 62; D.Ex.  
6 B; R.Tr. 71) and was drafted by the office of the Ventura  
7 County District Attorney (R. 143). All persons who partici-  
8 pated in the actual negotiation of the agreement for the Count  
9 were deceased at the time of the trial (R.Tr. 71). The mat-  
10 ter of copyright notices was not mentioned in either Black-  
11 burn's letter of May 5, 1956, offering to sell to the County  
12 the right to reproduce copies of the map (D.Ex. B; R. 62) or  
13 the July 17, 1956, agreement (P.Ex. 1; R. 5-6; appendix of  
14 brief) and was not discussed by Blackburn with the County un-  
15 til after June 7, 1963 (R. 163). As a result of the July 17,  
16 1956, agreement Blackburn furnished to the County photographi-  
17 negatives of the map from which linen tracings were prepared  
18 by Reed and Company for the County (R. 143; R.Tr. 87-88; R.  
19 163). Blackburn testified that the negatives provided to the  
20 County for the preparation of the tracings did contain copy-  
21 right notices (R.Tr. 18-44). The linen tracings obtained by  
22 the County did not contain copyright notices (R. 145, 163).  
23 Maps sold by the County were made from these tracings. Maps  
24 sold by the County up to June 1964 did not contain copyright  
25 notices (R. 143). Since that time, while maintaining that it  
26 had no obligation to do so, the County has affixed a copyright



1 notice to each copy of the map reproduced by the County  
2 (R. 143; R.Tr. 91, 98).

3 Blackburn testified that the map cost seven thousand  
4 five hundred dollars (\$7,500) to prepare and that the value  
5 of the copyright on the map prior to entering into the contract  
6 with the County was fifteen thousand dollars (\$15,000) (R.Tr.  
7 50). Blackburn's witness Renie testified that the value of  
8 the map prior to the agreement with the County was from fifteen  
9 thousand dollars (\$15,000) to twenty thousand dollars  
10 (\$20,000) (R.Tr. 79-82). Both witnesses testified that at  
11 the time of the trial the copyright had no value (R.Tr. 50,  
12 82).

13 The copies of the map sold by the County contained  
14 current information and were always within thirty days of  
15 being up to date (R.Tr. 92-93; R. 144). The copies of the  
16 map sold by Blackburn had not been up-dated since 1956 (R.Tr.  
17 67-70). The County sold copies of the map for fifteen dollars  
18 (\$15) while Blackburn sold them for seventy dollars (\$70)  
19 (R.Tr. 66). Blackburn testified that before entering the contract  
20 with the County his sales averaged one thousand five  
21 hundred dollars (\$1,500) a year and thereafter decreased to  
22 four hundred fifty dollars (\$450) to two hundred fifty dollars  
23 (\$250) a year (R.Tr. 64). The County's sales during the statutory  
24 period from October 1961 through June 1964 totaled  
25 three thousand eight hundred eighty-eight dollars (\$3,888)  
26 (R. 144). During this period the County sold ninety-six copies





1 of the complete map and one thousand nine hundred forty-eight  
2 (1,948) copies of separate parts of the map representing  
3 another sixty-eight (68) complete maps (R. 144). The County'  
4 sales increased by approximately fifty percent (50%) after  
5 the copyright notices were affixed in June 1964 (R.Tr. 91).

6 At the commencement of trial before taking testimon  
7 the court held as a matter of law that the map was copyright-  
8 able since the information on the map was copied from three o  
9 more sources (R.Tr. 8-9) and that since the subject matter of  
10 the agreement granting the right to reproduce copies of the  
11 map was a copyrighted instrument the County has an obligation  
12 as a matter of law to affix a copyright notice unless Black-  
13 burn clearly intended to destroy the copyright. (R.Tr. 12, 14)

14 The court further held that the only evidence in th  
15 record as to the value of the copyright was the testimony  
16 that the copyright was worth fifteen thousand dollars (\$15,00  
17 before the July 17, 1956 agreement and was worth nothing at  
18 the time of trial (R.Tr. 111-112), and that therefore damages  
19 were fifteen thousand dollars (\$15,000) less the one thousand  
20 nine hundred dollars (\$1,900) paid under the July 17, 1956  
21 agreement.

22 //////////////

23 //////////////

24 //////////////

25 //////////////

26 //////////////



1                                    SPECIFICATION OF ERRORS

2

3            1. The District Court erred in holding that Blackburn's

4 map is copyrightable as a matter of law.

5            2. The District Court erred in holding that the County

6 is obligated as a matter of law to affix copyright notices

7 to every copy of the map reproduced by the County under the

8 contract with Blackburn.

9            3. The District Court erred in finding that the damages

10 to Blackburn due to the infringement by the County were in

11 the amount of thirteen thousand one hundred dollars (\$13,100)

12 in that the Court failed to apportion the amount of damages

13 caused by the absence of copyright notices and the amount of

14 damages caused by other factors.

15                                    QUESTIONS PRESENTED

16            1. Whether a map compiled entirely from information

17 taken from public records and governmental sources is

18 copyrightable as a matter of law where the information

19 depicted on the map was copied from three or more sources.

20            2. Whether the owner's claim of a copyright in a map

21 which is the subject matter of an agreement imposes an

22 obligation to affix copyright notices on copies of that map

23 as a matter of law upon the purchaser of the unrestricted

24 rights under the agreement of reproduction, use and sale of

25 copies of the map.

26            //////////////



1 3. Whether one who has the unrestricted right to  
2 reproduce, use and sell copies of a map without payment of  
3 royalties to the claimant of a copyright is liable in damages  
4 for the entire diminution in value of the copyright over a  
5 period of years for failure to affix copyright notices to  
6 copies of the map.

7 SUMMARY OF ARGUMENT

8 Blackburn's map is not copyrightable as a matter of  
9 law merely because the information depicted on the map was  
10 gathered from three or more sources and put together on one  
11 piece of paper. Under Amsterdam v. Triangle Publications,  
12 189 F.2d 104 (3rd Cir. 1951); Axelbank v. Rony, 277 F.2d 314  
13 (9th Cir. 1960); and related cases a high degree of creativity  
14 and originality on the part of the map maker is necessary to  
15 secure a copyright on a map. Copying and compiling informa-  
16 tion from various sources is not sufficient original and  
17 creative work to make a map copyrightable.

18 The County is under no obligation to affix copyright  
19 notices to every copy of the map reproduced by the County  
20 under the agreement with Blackburn. In National Comics Pub-  
21 lications v. Fawcett Publications, 191 F.2d 594 (2nd Cir.  
22 1951), Judge Learned Hand says that if the copyright proprie-  
23 tor does not exact a promise from the licensee to affix copy-  
24 right notices to every copy reproduced by the licensee, the  
25 licensee may publish copies as it chooses, either with or  
26 without copyright notices affixed. The written contract is





1 the only agreement between Blackburn and the County and it  
2 contains no mention whatsoever of copyright notices. The  
3 Copyright Act does not place a mandatory duty on the County  
4 to affix copyright notices. The law will not construct  
5 against the County an implied promise to affix copyright no-  
6 tices for the sole purpose of making the County an infringer  
7 of copyright and liable to Blackburn for damages.

8 Even if the copyright on the map is valid and the  
9 County is liable for infringement, the damages awarded were  
10 excessive because they were not apportioned so that the Count  
11 must pay only the amount of damages which was caused by the  
12 absence of copyright notices. Under 17 U.S.C. 101 the in-  
13 fringer is liable to pay the proprietor only such damages as  
14 were suffered due to the infringement. The major cause of  
15 the loss in the value of the copyright was Blackburn's sale t  
16 the County of the right to reproduce and sell copies of the  
17 map to the public at prices to be determined by the County.  
18 The District Court did not properly determine the amount of  
19 damages caused by the absence of the copyright notices.

20  
21 I

22 BLACKBURN'S MAP OF VENTURA COUNTY DOES  
23 NOT CONTAIN SUFFICIENT ORIGINAL AND  
24 CREATIVE WORK TO BE COPYRIGHTABLE UNDER  
25 THE LAW OF THE UNITED STATES.

26 At the outset of the trial, the District Court held  
that the map compiled by Blackburn contained sufficient crea-  
tivity to be copyrightable.



1 The Court had not looked at the map and the only  
2 evidence on the issue of originality and creativity was con-  
3 tained in the Pretrial Conference Order (R. 144-145) where  
4 it was admitted that Blackburn had taken all of the informa-  
5 tion and data depicted on his map from government maps, the  
6 County Assessor's records, aerial photographs, U.S. Govern-  
7 ment topographical maps and other sources. There was no evi-  
8 dence of any effort or creativity by Blackburn in making his  
9 map other than copying from these sources.

10 In answer to the County's suggestion that the ques-  
11 tion was what if anything did Blackburn do to create a copy-  
12 rightable map in addition to merely extracting information  
13 from public records, other governmental sources and copying  
14 other maps, the District Court stated:

15 "I do not mean to be abrupt with you,  
16 counsel, but I don't agree with you at  
17 all. I think every lawyer who has had  
18 any experience at all, or anybody who  
19 tries to find the city boundary of . . .  
20 Oak View, you can go to the geological  
21 survey of the United States, which is  
22 now in Denver, and you can go to the  
23 county recorder's office and the city  
24 recorder's office and you will probably  
25 go back to the old land office maps .  
26 . . in Sacramento -- so in order to be  
able to get the proper boundaries of  
Oak View in relation to some public prop-  
erty you would have to go to Denver, to  
Sacramento and to Ventura today. So I  
will hold that it is creativity for  
somebody to put all that information to-  
gether on one piece of paper. So that  
disposes of that law issue." (R.Tr. 8-9.)

Apparently the Court held that in order to extract



1 the necessary information from public records and other gov-  
2 ernmental sources it would be necessary for Blackburn to go  
3 to Denver, Sacramento and Ventura and that going to these  
4 three sources of information and putting "all that information  
5 together on one piece of paper" was sufficient creativity to  
6 make the map copyrightable.

7 It should be noted that there is no evidence in the  
8 record that Blackburn actually went to the three sources men-  
9 tioned by the Court.

10 The Court's conclusion of law based on the assump-  
11 tion of the three sources is not supported by the cases.

12 As this Court stated in Axelbank v. Rony, 277 F.2d  
13 314, 318 (9th Cir. 1960):

14 "[I]t is well settled that maps as such are  
15 entitled to limited copyright protection .  
16 . . . We are unable to say as a matter of  
17 law that the appellant's [map] involved  
18 such a high degree of creation that even  
if copied by Rony it constituted an in-  
fringement of appellant's copyright."  
(Emphasis added.)

19 Under this principle it seems clear that copying from three o  
20 more sources does not involve such a high degree of creation  
21 as to make Blackburn's map copyrightable as a matter of law.

22 In Christianson v. West Pub. Co., 149 F.2d 202, 203  
23 (9th Cir. 1945) this Court held that an outline map of the  
24 United States with state boundaries is in the public domain  
25 and is not copyrightable. All of the information depicted on  
26 Blackburn's map is available to the public from other sources





1 (R. 145) and therefore is "in the public domain". All Black-  
2 burn did was to assemble, prepare, collate and compile the  
3 information from the public domain. Under the cases that is  
4 not enough creative and original work to make the map copy-  
5 rightable.

6 In Amsterdam v. Triangle Publications, 189 F.2d 104  
7 106 (3rd Cir. 1951) the court held that the "necessary amount  
8 of creative work to justify the copyright of plaintiff's map  
9 had not been shown" although the plaintiff had complied with  
10 the copyright statutes and had received a registration cer-  
11 tificate. In that case the plaintiff had studied other maps  
12 and spent considerable time and effort to assemble and prepare  
13 the information for publication, but the "actual original work  
14 of surveying, calculating and investigating" done by plaintiff  
15 was so negligible that it was discounted entirely. There is  
16 no evidence that Blackburn did even as much actual original  
17 work as Amsterdam.

18 The District Court's conclusion that Blackburn's  
19 map contains sufficient original and creative work to be  
20 copyrightable under the laws of the United States (R. 164)  
21 is clearly contrary to the law. Merely copying from three or  
22 more sources and compiling the information together on one  
23 piece of paper is not sufficient originality and creativity  
24 to make a map copyrightable as a matter of law.

25 //////////////

26 //////////////



THE REPRODUCTION AND SALE OF COPIES OF THE MAP WITHOUT COPYRIGHT NOTICES DID NOT CONSTITUTE AN INFRINGEMENT OF THE COPYRIGHT BY THE COUNTY BECAUSE THE COUNTY WAS NOT OBLIGATED UNDER EITHER THE CONTRACT WITH BLACKBURN OR COPYRIGHT LAW TO AFFIX COPYRIGHT NOTICES TO EACH COPY.

At the commencement of the trial and prior to the taking of testimony the District Court held as a matter of law that the County was obligated to put Blackburn's copyright notice on every copy of the map reproduced by the County under the contract with Blackburn. The Court stated "as long as the subject matter of the contract is a copyrighted map" and the County has the right to reproduce, it also has the obligation to put on the copyright notice (R.Tr. 12, 14). From this the Court concluded that the County had a positive duty under the contract and under section 10 of the Copyright Act to affix notices, that the County was bound by an implied covenant within the contract to affix copyright notices and that the breach of the implied covenants constituted an infringement of copyright so as to make the County liable for damages (R. 165).

The contract contains absolutely no mention of copyright notices, the only reference to copyright is contained in the statement that Blackburn is the proprietor of a map titled "Blackburn's Map of Ventura County, copyrighted compiled and published by O. V. Blackburn." Blackburn had never mentioned or discussed copyright notices with the County.



1 until seven years after the contract was made (R. 163).

2       The July 17, 1956, agreement gave the County of  
3 Ventura the unrestricted right to reproduce copies of the map  
4 for its own use and for sale to the public. In this regard  
5 three important factors deserve consideration. First, there  
6 was no restriction on the price which the County could charge.  
7 This is important because the failure of Blackburn to place  
8 any control on the County's sales price permitted the situa-  
9 tion to arise whereby the County could and in fact did under-  
10 sell Blackburn by a wide margin, fifteen dollars (\$15) to  
11 seventy dollars (\$70) (R.Tr. 66). Second, there were no re-  
12 strictions as to the sales area, the persons to whom the map  
13 could be sold or the period of time during which the County  
14 could reproduce and sell copies of the map. Thus Blackburn  
15 reserved no specific territory, customers or period of time  
16 for his own sales. Last and very significant, Blackburn made  
17 no provision for payment of royalties on the maps sold by the  
18 County. This factor is crucial because since Blackburn was  
19 not entitled to royalties from the County for maps sold, the  
20 failure to affix copyright notices did not have the usual ef-  
21 fect of depriving Blackburn of that natural source of income.  
22 This feature distinguishes this case from the cases in which  
23 a promise to affix the notice may be implied by the courts.

24       Taking all factors together, Blackburn's sale of the  
25 unrestricted rights of reproduction, use and sale of copies  
26 of his map, reserving only the right to make his own copies





1 for sale seems to constitute an absolute abandonment of any  
2 copyright he might have had. This conclusion is especially  
3 compelling considering that he made no effort to update his  
4 own map since the sale to the County.

5 The District Court's conclusion that the County was  
6 obligated to affix copyright notices because the subject mat-  
7 ter of the contract was a map in which Blackburn claimed a  
8 copyright and the implying of a promise to affix copyright no-  
9 tices to maps sold by the County are clearly contrary to the  
10 law.

11 A. The Court Erroneously Assumed That the County Was Obligated  
12 to Affix the Copyright Notices Unless Blackburn Expressly  
13 Waived His Copyright or Unless There Was Very Strong  
14 Evidence That He Intended to Destroy It.

15 The District Court failed to distinguish between the  
16 concept of forfeiture of a copyright and the concept of  
17 abandonment or waiver of a copyright. The Court stated:

18 "If he sold you the right to print the  
19 map and sell it without a copyright then  
20 didn't he destroy his copyright? . . . .  
21 Well, I think that would be a harsh re-  
22 sult, and certainly it would to me take  
23 very strong evidence to show that he  
24 intended to do that.

25 " . . . . I think it comes down to  
26 a question of whether or not the plaintiff  
here waived his right to the copyright by  
deliberately and purposely giving them  
photostatic negatives for the purpose of  
reproduction without having the copyright  
notice on them." (Emphasis added. R.Tr.  
15, 16.)

26 //////////////



1 While there was "very strong evidence" in the con-  
2 tract with the County that Blackburn intended to destroy the  
3 value of his copyright if not the copyright itself, the Court  
4 refused even to consider that the copyright could be lost un-  
5 intentionally through Blackburn's inadvertence or neglect.  
6 Although one of the conclusions of law states that Blackburn  
7 has not forfeited his copyright (R. 165), the District Court  
8 erroneously assumed that the copyright could be lost only if  
9 Blackburn intended to destroy it.

10 The forfeiture of a copyright does not require any  
11 evidence of a deliberate, purposeful or intentional surrender  
12 or waiver of the copyright by the copyright proprietor. In  
13 National Comics Publications v. Fawcett Publications, 191 F.2d  
14 594, 598 (2d Cir. 1951), Judge Learned Hand explained the dif-  
15 ference between the concepts in the following language:

16 "It is of course true that the publication  
17 of a copyrightable 'work' puts that 'work'  
18 into the public domain except so far as it  
19 may be protected by copyright. That has  
20 been unquestioned law since 1774; and  
21 courts have often spoken of it as a  
22 'dedication' by its 'author or proprietor.'  
23 That, however, is a misnomer, for 'dedi-  
24 cation,' like 'abandonment,' presupposes  
25 an intentional surrender, which is in no  
26 sense necessary to the 'forfeiture' of a  
copyright. An author whose work is 'for-  
feited,' need have had no such purpose,  
and ordinarily does not; it was indeed  
long doubtful whether he did 'forfeit'  
his rights by publication, and when it  
was settled that he did, the result was  
a consequence, imposed invitum upon him  
because of his failure to comply with  
the prescribed formalities." (Emphasis  
added.)



1 In discussing whether Admiral Rickover had forfeited  
2 his right to a copyright on certain speeches in Public Affairs  
3 Associates, Inc., v. Rickover, 284 F.2d 262, 269 (D.C. Cir.  
4 1960), the court said:

5 "The word 'forfeit' is adopted to avoid  
6 'dedication' or 'abandonment' which seem  
7 to suggest purposeful release to the  
8 public." (n.)

9 The failure of the District Court to recognize the  
0 concept of forfeiture led to the erroneous conclusion that  
1 unless Blackburn had deliberately, purposely and intentionally  
2 waived his copyright by an express waiver or by very strong  
3 evidence that he intended to waive it, the County was obli-  
4 gated to affix the copyright notices to copies of the map re-  
5 produced by the County and failure to do so constituted an  
6 infringement of the copyright. The District Court erred in  
7 refusing to consider that the carelessness or negligence of  
8 Blackburn in protecting his copyright could result in the for-  
9 feiture of the copyright even though he did not intend to de-  
0 stroy it.

1 B. The Copyright Act Does Not Impose Upon the County the  
2 Duty or Obligation to Affix Copyright Notices to Each  
3 Copy of the Map Reproduced by the County.

4 The District Court concluded that a positive duty  
5 exists on the part of the County under the contract and "under  
6 section 10 of the Copyright Act" to affix a notice of Black-  
burn's copyright on each copy of the map reproduced by the





County (R. 165). The conclusion was apparently based upon Blackburn's argument that 'the plain mandate of section 10 of the statute where it says, 'and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor'" required the County to affix copyright notices even though the contract was silent as to such requirement. (R.Tr. 15.)

This interpretation of section 10 of the Copyright Act is clearly erroneous. The section reads:

"Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor . . . ." 17 U.S.C. 10.

It is apparent from reading this section that the affixing of notice to each copy is merely a condition to securing the copyright. It is not a "plain mandate" to the proprietor and all the world that such notice shall be affixed to each copy. If it were, the copyright proprietor could never dedicate or abandon his copyright because every copy would have to contain the copyright notice by the "plain mandate of section 10". Thus the section does not state a mandatory duty but merely states a required condition for securing a copyright.

The effect of section 10 was explained by Judge Hand in the National Comics case, supra, 191 F.2d 594, 600:

"The question is whether the absence or



1 the imperfection of the notices on these  
2 'strips' 'forfeited' their copyrights,  
3 when they were published in the 'syndi-  
4 cated' newspapers. The answer depends  
5 upon the terms of the contract of bor-  
6 rowing. Section 10 provides that the  
7 first publication of a 'work' with the  
8 'required' notice secures the copyright;  
9 but it implies that a failure to affix  
10 the notice upon each copy, later pub-  
11 lished 'by authority of the copyright  
12 proprietor,' will 'forfeit' it; and such  
13 is the law."

14 Thus whether the County is required to affix copyright notices  
15 depends upon the terms of the contract with Blackburn. A  
16 mandatory duty to affix notices is not imposed by section 10  
17 of the Copyright Act. Therefore, the District Court's con-  
18 clusion that a positive duty exists on the part of the County  
19 under section 10 of the Copyright Act to affix a notice of  
20 Blackburn's copyright to each copy of the map reproduced by  
21 the County is clearly contrary to the law.

22 C. The Agreement Between Blackburn and the County Under Which  
23 the County Reproduced Copies of the Map Does Not Impose  
24 Upon the County the Duty or Obligation to Affix a Notice  
25 of Blackburn's Copyright to Each Copy.

26 The only mention of copyright in the agreement be-  
tween Blackburn and the County is contained in the first  
paragraph where it states:

"Whereas, O. V. Blackburn is the pro-  
priator of a certain map of Ventura County,  
California, titled 'Blackburn's Map of  
Ventura County, copyrighted, compiled and  
published by O. V. Blackburn'. . ." (R. 5;P.Ex. 1.)

The written contract is a valid, legal and binding contract



and is the only and entire agreement between Blackburn and the County (R. 143). The contract states that Blackburn is the proprietor of a map; it does not state that he is the proprietor of a copyright.

The contract contains no provision for the payment of periodic royalties to Blackburn. The County's rights are unrestricted as to the prices to be charged, the geographic area, the duration of time and the persons to whom the County may sell. Thus, it is not the usual copyright license. But even if it were, the County is not obligated to affix copyright notices.

1. The agreement is absolutely silent as to any duty or obligation to affix copyright notices to each copy of the map.

The law with respect to the duty or obligation of a copyright licensee to affix copyright notices is clearly stated in the National Comics case, supra, 191 F.2d 594, 600-601:

"If [the copyright proprietor] . . . gave [the licensee] . . . an unconditional license to publish the 'strips,' their publication without the 'required' notice was 'by authority of the copyright proprietor,' and had the same effect upon the copyrights that similar publication by [the copyright proprietor] . . . would have had: it 'forfeited' them unless § 21 saved them. On the other hand if [the licensee] . . . promised to affix the 'required' notice upon the borrowed 'strips' -- as it did upon the 'strips' made under the contract -- the performance of that contract was a condition upon the license . . . .





1 "[I]f [the copyright proprietor]  
2 . . . exacted a promise from [the li-  
3 cence] . . . to affix the notice upon  
4 all copies which the newspaper published,  
5 performance of that promise became a con-  
6 dition upon that [the licensee's] . . .  
7 license to publish . . . . But, if [the  
8 copyright proprietor] . . . did not exact  
9 any such promise from the [licensee] .  
10 . . . to which it sent a 'mat,' it gave  
11 'authority' to the [licensee] . . . to  
12 publish as it chose, and the copyright  
13 was 'forfeited,' if the [licensee] . . .  
14 failed to annex the 'required' notice."  
15 (Emphasis added.)

16 Since Blackburn did not exact a promise from the  
17 County to affix the copyright notice to each copy he gave the  
18 County authority to publish as it chose, either with or with-  
19 out copyright notices affixed. The failure to affix copyright  
20 notices therefore was not an infringement of the copyright.  
21 Whether the copyright was forfeited by Blackburn's failure to  
22 exact such a promise from the County depends upon whether sec-  
23 tion 21 of the Copyright Act is applicable to this situation.  
24 Holding that the failure of the County to affix notices does  
25 not constitute infringement of a copyright does not necessarily  
26 lead to the result that Blackburn's copyright has been for-  
feited.

27 The burden is upon the proprietor of the copyright  
28 to secure and protect his rights. If through neglect, inad-  
29 vertence or design he fails to protect his rights and does  
30 not exact a promise from the licensee to affix his copyright  
31 notice to all copies made by the licensee, the licensee is not  
32 liable for damages for copyright infringement. There is no



1 evidence that Blackburn ever attempted to exact a promise  
2 from the County to affix notices. He never even mentioned  
3 copyright notices until seven years later. The County there-  
4 fore is not liable for damages for infringement for failing  
5 to affix copyright notices.

- 6 2. A promise to affix copyright notices will not  
7 be implied against the County so as to make the  
8 County liable for damages for infringement of  
9 copyright.

10 The District Court held that since the subject  
11 matter of the contract between Blackburn and the County was  
12 a copyrighted map, the County was bound by an implied cove-  
13 nant to put the copyright notices on each copy of the map  
14 reproduced by the County (R. 165; R.Tr. 12-13, 14).

15 In the National Comics case, supra, 191 F.2d  
16 594, the District Court had held that the copyright owner  
17 had "abandoned" the copyrights by negligent omissions of  
18 copyright notices. The Circuit Court reversed the judgment  
19 and remanded the case for a determination as to whether the  
20 copyright owner had "forfeited" any of the copyrights by  
21 failing to exact a promise to affix copyright notices from  
22 the licensees or by failing to affix notices on the strips  
23 the owner had published. The contracts with the licensees  
24 were not before the Circuit Court so it could not determine  
25 whether the contracts contained a promise to affix notices

26 //////////////



1 on the part of the licensees. However it was clear that the  
2 subject matter of the contracts with the licensees was copy-  
3 righted material. Therefore if the law implies a covenant to  
4 affix copyright notices by the licensee where the subject  
5 matter of the contract is copyrighted material, there would  
6 have been no need to remand the National Comics case to  
7 the District Court. Thus, the holding of the District Court  
8 that the County is bound by an implied covenant to affix  
9 copyright notices because the subject matter of the contract  
10 between Blackburn and the County is a copyrighted map is  
11 clearly erroneous.

12 The cases in which the courts have found an implied  
13 covenant of good faith and fair dealing in a copyright li-  
14 cense concerned literary material rather than maps. They  
15 involved disputes as to which of the various rights protected  
16 by a copyright were transferred in the license. In the  
17 leading case of Manners v. Morosco, 252 U.S. 317, 40 S.Ct.  
18 335, 64 L.Ed. 590 (1920), the dispute was whether the license  
19 had transferred the motion picture rights in the play, "Peg  
20 O' My Heart." It was held that the contract transferred the  
21 stage play rights and did not include the movie rights. The  
22 court implied a negative covenant of good faith and fair deal-  
23 ing to prevent the copyright owner from selling the movie  
24 rights to anyone else during the time that the licensee held  
25 the rights to produce the stage play. Kirke La Shelle Co. v.  
26 Paul Armstrong Co., 263 N.Y. 79, 188 N.E. 163 (N.Y.Ct.App.





1 1933), also involved the right to produce a stage play under  
2 a license and the right to produce a motion picture. Since  
3 the license contract was made before the invention of talking  
4 pictures the court applied an implied covenant of good faith  
5 and fair dealing to prevent the copyright owner from giving  
6 the talking movie rights to another. In Uproar Co. v. Na-  
7 tional Broadcasting Co., 81 F.2d 373 (1st Cir. 1936), a  
8 covenant of good faith and fair dealing was implied to pre-  
9 vent the author of radio scripts which had been prepared  
10 under a contract with an advertiser from using them in a way  
11 which would injure or interfere with the benefits to the ad-  
12 vertiser under the contract.

13 Johnston v. 20th Century-Fox Film Corp., 82 Cal.  
14 App.2d 796, 187 P.2d 474 (1947) was a dispute over an oral  
15 agreement granting a film corporation the right to the ex-  
16 clusive use of the title to a book, "Queen of the Flat Tops".  
17 In answer to the film company's contention that the contract  
18 was without consideration the court said the agreement  
19 carried with it implied obligations upon the part of the  
20 author to fully and adequately protect the film company's  
21 use of the title. 82 Cal.App.2d 796, 819; 187 P.2d 474, 488.  
22 Since the title had acquired a secondary meaning with a right  
23 of protection not dependent upon copyright, the author was  
24 not necessarily under an obligation to refrain from letting  
25 the book fall into the public domain. The film company bar-  
26 gained for the use of the title only and "cannot complain



1 because it did not get more."

2       April Productions v. G. Schirmer, Inc., 308 N.Y.  
3 366, 126 N.E. 2d 283 (N.Y.Ct.App. 1955), involved a contract  
4 between songwriters and a music publishing company. It was  
5 stated that where the parties to the contract were two music  
6 publishing houses who both "well knew no property or literary  
7 right would survive without compliance" with the copyright law,  
8 copyrighting by the publishing company was a necessarily im-  
9 plied covenant of the agreement (126 N.E. 2d 288). The  
0 covenant was not implied for the purpose of making the pub-  
1 lishing company liable to the author for damages for infringe-  
2 ment of the copyright.

3       In all of these implied covenant cases the copy-  
4 right protected several other rights in addition to the right  
5 to reproduce and sell copies of the copyrighted material to  
6 the public. In none of them was a promise to affix copy-  
7 right notices implied for the purpose of making a licensee  
8 liable to the copyright proprietor for damages for infringe-  
9 ment of the copyright.

1       The only reason for the court to construct a prom-  
2 ise by the County to affix copyright notices is to make the  
3 County liable for damages for infringement. The County has  
4 not used and has not threatened to use any part of the copy-  
5 right estate which was not granted to it in the agreement  
6 with Blackburn. The County has not threatened to use any  
7 movie rights, recording rights or any other rights protected



by a copyright. The County does not claim that it acquired the "right to destroy the copyright," if there is such a right in a "copyright." It is clear that the County did acquire the right to reproduce and sell copies of the map to the public at prices to be determined by the County (R. 5; P.Ex. 1). The agreement contains no restrictions as to the prices to be charged, the geographic area covered, or the duration of the right of the County to reproduce and sell copies of the map. It does not restrict the right of the County to transfer or assign all or part of the rights granted to the County to other persons. To the extent that the rights granted to the County may be termed the "right to destroy the value of the copyright", the County clearly was granted that right in the agreement with Blackburn. But there can be no doubt that Blackburn intentionally granted these rights to the County. Blackburn's sale to the County in 1956 of the right to reproduce and sell copies of the map certainly was an abandonment of his exclusive rights under the copyright. He gave up his monopoly and himself effectively destroyed the value of the copyright. The 1956 agreement is clear evidence of his intentional, purposeful and deliberate abandonment of his exclusive rights under the copyright, if not of the copyright itself.

If the copyright was destroyed, it was destroyed by Blackburn's inadvertence, design or neglect. As is clear from the National Comics case, supra, 191 F.2d 594, the





"forfeiture" of the copyright is imposed upon him invitum because of his failure to exact a promise from the County to affix copyright notices to each copy of the map unless the omission was by accident or mistake and is excused by section 21 of the Copyright Act. The law does not construct an implied promise merely because one has failed to protect his rights.

### III

THE DISTRICT COURT AWARDED EXCESSIVE DAMAGES BY FAILING TO PROPERLY DETERMINE THE AMOUNT OF THE DAMAGE WHICH WAS CAUSED BY THE FAILURE OF THE COUNTY TO AFFIX COPYRIGHT NOTICES.

In a copyright infringement action the owner of the copyright is entitled to recover "such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement." 17 U.S.C. 101. He is not entitled to recover damages for any loss, injury or harm which was not caused by the infringement or any profits of the infringer which were not made from the infringement. The plaintiff may not claim as an item of actual damages the injury to his business which would have resulted from the defendant's authorized use of the work. See Consumers Union of the United States v. Hobart Mfg. Co., 189 F.Supp. 275 (SDNY 1960). Thus in assessing the damages to be recovered for copyright infringement the court must apportion the items of loss and profit so that the copyright proprietor recovers only the



damages or the profits resulting from the infringement of the defendant. See Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390, 60 S.Ct. 681, 84 L.Ed. 825 (1940) and Orgel v. Clark Boardman Co., Ltd., 301 F.2d 119 (2d Cir. 1962). In lieu of actual damages, the court may award "such damages as to the Court shall appear to be just" assessed at the rate of \$1 for every infringing copy but not to exceed five thousand dollars (\$5,000) nor be less than two hundred fifty dollars (\$250). 17 U.S.C. 101(b).

Blackburn in open court waived any claim to recovery of profits which may have been made by the County from any infringement (R. 164; R.Tr. 49). The issue of damages then became a choice between the actual damages suffered due to infringement or the statutory damages allowed in lieu of actual damages. The "infringement" found was the failure of the County to affix copyright notices to copies of the map reproduced by the County from July 1956 until June 1964 (R. 165, 160). The district judge recognized that Blackburn was entitled to recover damages only to the extent that they were caused by the failure of the County to affix the copyright notice during the statutory period (R.Tr. 109). The Court, however, awarded damages in the full amount of Blackburn's estimate of the market value of the copyright prior to the time of entering the contract with the County less only the amount which the County had already paid Blackburn under the contract (R. 164; R.Tr. 111). It is clear that the District



Court did not consider ~~what~~ the value of the copyright would have been at the time of trial but for the failure of the County to affix copyright notices during the statutory period. The Court failed to distinguish between the damage caused by the absence of copyright notices during the three years preceding the filing of the complaint and the loss to Blackburn from other causes.

In answer to the County's argument that Blackburn's damages from the absence of copyright notices were less than fifteen thousand dollars (\$15,000), the District Court stated:

"The difficulty, counsel, in all of these cases is that you can make a very plausible argument that there is no damages, but you have got to have evidence, and the only evidence I have here is that the copyright was worth \$15,000.

"However I will admit this, it was reduced by \$1,900 which he got for that.

"So the judgment should be for \$13,100, it should be reduced by the \$1,900.

"But the difficulty with your situation, as I say, counsel, is that it is very plausible to make that argument but I just don't have any evidence. I have found here that he was damaged and I have got to have something to hang my hat on insofar as evidence is concerned." (Emphasis added. R.Tr. 111-112.)

Thus, the District Court erroneously placed upon the County the burden of proving that the entire diminution in the value of the copyright was not caused by the failure of the County to affix copyright notices. But even if the





burden were on the County, the Court erroneously held that there was no evidence other than Blackburn's. There was sufficient evidence to establish that the entire loss of value was not caused by the absence of copyright notices from copies reproduced and sold by the County. The best and most reliable evidence of the value of the copyright is the amount which Blackburn accepted on July 17, 1956, for virtually all of the rights involved in the copyright of the map. As is shown by the above language from the transcript, the Court did not consider this evidence.

A. The Primary Cause of the Loss in Value of the Copyright Was the Fact that Blackburn on July 17, 1956, Sold to the County the Right to Reproduce and Sell Copies of the Map to the Public Without any Restrictions as to the Prices to be Charged, the Payment of Periodic Royalties, the Geographic Territory, or the Duration of the Rights.

The copyright in a map is nothing more than the exclusive right to print, reprint, publish, copy and vend the map. 17 U.S.C. 1(a). The "copyright" in a map does not include dramatic rights, performing rights, movie rights, recording rights and other rights normally involved in literary material. Thus any "copyright" which Blackburn had in the map was simply the exclusive right to reproduce and sell copies of the map. After selling the right to reproduce and sell copies of the map to the County on July 17, 1956,



1 Blackburn no longer had the exclusive rights. He no longer  
2 had the monopoly granted him by the Copyright Act. He could  
3 not thereafter convey to anyone else the exclusive right to  
4 reproduce and sell copies of the map.

5 Whatever rights were left in Blackburn's "copyright"  
6 after July 17, 1956, were clearly of much less value than the  
7 rights which were involved in the copyright before July 17,  
8 1956. The map is a map of Ventura County, the County is the  
9 major market area for the map. The County was given the  
0 right to reproduce and sell unlimited numbers of copies of  
1 the map to the public at prices to be determined by the  
2 County. The County was not required to make periodic royalty  
3 payments to Blackburn. The County could have given away  
4 copies of the map if it so desired. The County's rights were  
5 not restricted to any geographic area or period of time. The  
6 County was free to compete anywhere and anytime with Blackburn  
7 or anyone else to whom he may have sold the right to repro-  
8 duce and sell copies of the map.

9 All that Blackburn had left of the "copyright" after  
0 July 17, 1956, was a non-exclusive right to reproduce and sell  
1 copies of the map. He had only the "right" to compete with  
2 the County for sales and that is all that he could have sold  
3 to anyone else. The "exclusive" rights of the "copyright"  
4 were split between Blackburn and the County after July 17,  
5 1956. What Blackburn retained certainly was no more valuable  
6 than what he had sold to the County for one thousand nine



1 hundred dollars (\$1,900). In view of the fact that the  
2 County could and did reproduce and sell copies to the public  
3 at a much lower price than Blackburn (R.Tr. 66), the rights  
4 which Blackburn retained after July 17, 1956, were worth much  
5 less than one thousand nine hundred dollars (\$1,900).

6 The value of the copyright clearly was greatly  
7 diminished by the sale to the County of the right to reproduce  
8 and sell copies to the public. Blackburn's opinion that the  
9 copyright was "just as valuable" after the sale to the County  
10 (R.Tr. 74-75) is pure nonsense. It simply does not hold up  
11 under an analysis of the rights involved in the copyright of  
12 a map.

13 Blackburn himself unwittingly stated the real cause  
14 of the decrease in the value of the copyright when he said,

15 "I never developed any business because I  
16 had no chance to because I couldn't compete  
17 with the price they were selling it for . .  
18 . . Previous to 1956 I was selling \$1,500  
19 worth of maps a year. From then on it  
20 dropped down from \$450 to \$250 a year be-  
21 cause they could buy this big scale from  
22 the County for less than I could sell the  
23 reduced scale that I depended on." (Em-  
24 phasis added. R.Tr. 64.)

25 He testified that the County sold copies of the map for fif-  
26 teen dollars (\$15) whereas he sold them for seventy dollars  
(\$70) (R.Tr. 66). When asked whether the value of the copy-  
right was reduced by the sale of rights to the County, Black-  
burn answered, "not if they hadn't undersold me." (R.Tr. 74.)  
Blackburn recognized that the primary cause of his loss was





1 the competition of the County and not the failure of the  
2 County to affix copyright notices. This is also shown by  
3 the fact that the County's sales increased by fifty percent  
4 (50%) after the copyright notices were affixed (R.Tr. 91).  
5 The District Court however ignored the loss which was caused  
6 by the contract with the County and in effect rewrote the  
7 contract to give Blackburn the full amount of his estimate of  
8 the market value of the copyright.

9 It is clear that the District Court in awarding  
10 damages in the amount of thirteen thousand one hundred dollars  
11 (\$13,100) did not consider the great reduction in value caused  
12 by the contract with the County and did not apportion the  
13 damages. The District Court therefore did not follow the law  
14 and did not award only "such damages as the copyright pro-  
15 prietor may have suffered due to the infringement."

16 B. The Value of the Copyright was Greatly Decreased by the  
17 Fact that the Copies of the Map Sold by the County Under  
18 the Agreement of July 17, 1956, Were Current and Up to  
19 Date Whereas the Copies Sold by Blackburn Were Not Up to  
20 Date.

21 At the time of the trial nearly nine years had  
22 passed since Blackburn had sold the County the right to re-  
23 produce and sell copies of the map to the public. The County  
24 had corrected errors, added to, up-dated and kept current the  
25 information depicted on the copies of the map reproduced and  
26 sold by the County under the agreement with Blackburn (R. 144,



1 R.Tr. 92-93). Blackburn, however, did not keep the map cur-  
2 rent and up to date (R.Tr. 67-70) so the copies reproduced  
3 and sold by him did not contain current information.

4 The map involved covers the most populous area of  
5 one of the fastest growing counties in California. As the  
6 trial judge observed (R.Tr. 110) it is reasonable to assume  
7 that copies of the map are not bought "for antiques to put  
8 in a museum." The title insurance companies, public utilities  
9 and service corporations to whom the County sold copies of  
10 the map (R. 144) obviously were interested in buying copies  
11 of a current and up-to-date map.

12 The District Court's conclusion that the work of  
13 the County in correcting and up-dating the map has no bearing  
14 on the issue of damages (R. 166) is clearly erroneous. In  
15 assessing the damages "due to the infringement" the District  
16 Court should have considered the diminution in the value of  
17 the copyright which was caused by the fact that a current  
18 and up-to-date version of the map was on the market in com-  
19 petition with Blackburn's copies of the map. The District  
20 Court did not properly ascertain the damages suffered by  
21 Blackburn due to the failure of the County to affix copyright  
22 notices.

23 C. The District Court Should Have Awarded the Statutory  
24 Damages in Lieu of Actual Damages Because There Was  
25 no Evidence of the Amount of Actual Damage Which Was  
26 Caused by Any Infringement of the County.



1 Blackburn testified that his sales of copies of  
2 the map dropped from one thousand five hundred dollars  
3 (\$1,500) a year to four hundred fifty dollars (\$450) or two  
4 hundred fifty dollars (\$250) a year (R.Tr. 64). This would  
5 be an average loss of sales of one thousand one hundred fifty  
6 dollars (\$1,150) a year or a total of nine thousand two hun-  
7 dred dollars (\$9,200) from July 1956 until the County affixed  
8 copyright notices in June 1964 and a total of three thousand  
9 four hundred fifty dollars (\$3,450) for the three-year period  
10 of the statute of limitations. But there is no evidence as  
11 to what portion of the loss of sales was caused by the failure  
12 of the County to affix copyright notices. There was no evi-  
13 dence before the Court as to what Blackburn's loss of sales  
14 would have been if the County had affixed copyright notices  
15 to every copy. The County's sales increased by fifty percent  
16 (50%) after the copyright notices were affixed (R.Tr. 91), so  
17 it is obvious that the absence of copyright notices was not  
18 the sole cause if any cause at all, of Blackburn's loss of  
19 sales.

20 Blackburn testified that the market value of the  
21 copyright went from fifteen thousand dollars (\$15,000) in  
22 1956 to nothing at the time of the trial (R.Tr. 50). His  
23 witness Renie testified that the value of the copyright in  
24 1956 was fifteen thousand dollars (\$15,000) to twenty thousand  
25 dollars (\$20,000) (R.Tr. 79) and that after the sale of the  
26 rights to the County and the sale of copies by the County





1 without copyright notices the copyright had no value. But  
2 neither Blackburn nor Renie testified as to what portion of  
3 the loss in value was caused by the failure of the County to  
4 affix copyright notices and what portion was caused by the  
5 sale of the rights to the County and other factors.

6 The best evidence of the value of the copyright in  
7 1956 is the fact that Blackburn in 1956 sold the right to  
8 reproduce and sell copies to the public for one thousand nine  
9 hundred dollars (\$1,900). If the copyright really was worth  
10 fifteen thousand dollars (\$15,000) Blackburn surely would not  
11 have sold what is in effect all of the protected rights for  
12 only one thousand nine hundred dollars (\$1,900). But regard-  
13 less of the amount of its market value there is no evidence  
14 of what portion of the loss in value was caused by the  
15 County's infringement.

16 The District Court apparently accepted as true  
17 the testimony that the copyright had lost all of its value.  
18 The Court held that Blackburn did not forfeit or waive his  
19 copyright and in fact still holds it (R. 164-166). Blackburn  
20 did not lose his copyright yet the Court awarded damages for  
21 the full claimed value of the copyright prior to the agree-  
22 ment of July 17, 1956, just as though the copyright had been  
23 lost.

24 Blackburn testified that since July 1956 he sold  
25 from four hundred fifty dollars (\$450) to two hundred fifty  
26 dollars (\$250) worth of copies of the map a year. (R.Tr. 64).



1 At that rate he received approximately two thousand eight  
2 hundred dollars (\$2,800) from sales of copies of the map up  
3 to the time the County affixed copyright notices in June 1964.  
4 The County's sales increased by fifty percent (50%) after the  
5 copyright notices were affixed (R.Tr. 91) and Blackburn's  
6 sales continued to decrease (R.Tr. 66-67). Blackburn still  
7 has the copyright (R. 164-166; R.Tr. 109) and is able to  
8 make future sales and recover from anyone who may infringe  
9 his copyright. Thus the copyright clearly is not valueless  
10 now and the absence of copyright notices from copies sold by  
11 the County did not cause damage in the amount of thirteen  
12 thousand one hundred dollars (\$13,100).

13 Since there was no proof of the amount of actual  
14 damages caused by the absence of copyright notices, the  
15 District Court should have awarded statutory in lieu damages  
16 if any damages were to be awarded. There was evidence that  
17 the County had sold 96 complete copies of the map and 1,948  
18 separate parts representing approximately 68 more complete  
19 copies of the map which did not contain the copyright notice  
20 in the three years before the complaint was filed (R. 144).  
21 There was sufficient basis for the Court to award damages at  
22 the rate of one dollar (\$1) per infringing copy not to exceed  
23 five thousand dollars (\$5,000) nor be less than two hundred  
24 fifty dollars (\$250).

25 By failing to properly determine the amount of  
26 damage caused by the failure of the County to affix copyright



1 notices during the statutory period, the District Court has  
2 awarded excessive damages.

3 CONCLUSION

4 For the reasons stated, it is respectfully submitted  
5 that the District Court's judgment should be reversed, and the  
6 cause remanded with instructions to dismiss the complaint and  
7 enter judgment granting appropriate relief to the County of  
8 Ventura, or in the alternative, with instructions to enter  
9 judgment granting Blackburn damages in an amount in the dis-  
10 cretion of the trial court not to exceed five thousand dollars  
11 (\$5,000) nor be less than two hundred fifty dollars (\$250), or  
12 to grant other appropriate relief to which the County of  
13 Ventura may be entitled.

14 WOODRUFF J. DEEM  
15 District Attorney

16 HERBERT L. ASHBY  
17 Assistant District Attorney

18 KARL H. BERTELSEN  
19 Deputy District Attorney

20 County of Ventura  
21 Courthouse  
22 Ventura, California

23  
24  
25  
26  
September 1965.





1                   AGREEMENT TO REPRODUCE MAP OF

2                               VENTURA COUNTY

3               WHEREAS, O. V. BLACKBURN is the proprietor of a  
4 certain map of Ventura County, California titled "Blackburn's  
5 Map of Ventura County, copyrighted, compiled and published  
6 by O. V. Blackburn", and

7               WHEREAS, it is the desire of the COUNTY OF VENTURA,  
8 California to obtain a duplicate tracing of said map, together  
9 with the right to reproduce said map for use by the County  
10 Surveyor and for sale to the public,

11              NOW, THEREFORE, the COUNTY OF VENTURA, California,  
12 hereafter called County, and O. V. BLACKBURN, 6400 West  
13 Boulevard, Los Angeles, California, hereafter called Blackburn,  
14 agree as follows:

15              1. Blackburn grants and sells to County the right  
16 to obtain duplicate tracings on linen from the photographic  
17 negatives of Blackburn's Map of Ventura County. County shall  
18 bear the expense of making such duplicate tracings. Upon  
19 completion said duplicate tracings shall be the property of  
20 County.

21              2. Blackburn grants and sells to County the right  
22 to reproduce from said duplicate tracings any and all maps  
23 necessary for County use.

24              3. Blackburn grants and sells to County the right  
25 to sell prints of said duplicate tracings to the public at  
26 such prices as may be determined by County.



1           4. County agrees to pay Blackburn the sum of  
2 one thousand nine hundred dollars (\$1,900) as full considera-  
3 tion for the rights herein granted and sold.

4           5. Nothing contained in this agreement shall be  
5 deemed or construed to restrict the right of Blackburn to  
6 sell reproductions of Blackburn's Map of Ventura County to  
7 the public in Ventura County or elsewhere.

8           DATED this 17th day of July, 1956.

9  
10                           COUNTY OF VENTURA

11  
12                           By s/ L. A. PRICE  
13                               Chairman  
14                               Board of Supervisors, County  
                              of Ventura, State of  
                              California

15       ATTEST:

16       L. E. HALLOWELL, County Clerk  
17       of the County of Ventura and  
18       ex officio Clerk of the Board  
19       of Supervisors thereof

20  
21       By s/ SHIRLEY WEEKS  
22       Deputy Clerk

23  
24  
25                                   s/ O. V. BLACKBURN  
26                               O. V. Blackburn



# TABLE OF EXHIBITS

<u>Exhibit</u>	<u>Copy (Record Page)</u>	<u>Identified (Transcript Page)</u>	<u>Received In Evidence (Transcript Page)</u>
Plaintiff's 1 (Contract)	5-6	17	17
Plaintiff's 2-A - 2-H (Photographic Negatives of the map)		18	23
Plaintiff's 2-A-1 - 2-H-8 (Duplicate tracings of the map)		39, 44	44
Plaintiff's 2-I (Index map)		40	42
Plaintiff's 3 (Certificate of Registration of Claim to Copyright)	74-75	51	51
Plaintiff's 4 (Printing order)	105	88	89
Plaintiff's 5 (Index map)		95	97
Defendant's B (Letter from Blackburn)	62	102	103
Defendant's C (Tracing of portion of the map)		100	101
Defendant's D (Blueprint of portion of the map)		100	101





1                   C E R T I F I C A T I O N

2                   I certify that, in connection with the preparation  
3 of this brief, I have examined Rules 18 and 19 of the United  
4 States Court of Appeals for the Ninth Circuit, and that, in  
5 my opinion, the foregoing brief is in full compliance with  
6 those rules.

7  
8                   Karl H. Bertelsen

9                   KARL H. BERTELSEN  
10                  Deputy District Attorney  
11                  County of Ventura  
12                  State of California  
13  
14  
15  
16  
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26



1                    DECLARATION OF SERVICE BY MAIL

2

3            I, SOPHIA DeLESdernier, declare:

4            I am a citizen of the United States, over 18 years

5 of age, and not a party to the within cause; my business ad-

6 dress is 501 Poli Street, Ventura, California; I served three

7 copies of the attached brief for appellant on George R. Maury,

8 attorney for appellee, by placing same in an envelope ad-

9 dressed as follows:

10                    George R. Maury  
11                    Suite 910  
12                    3440 Wilshire  
13                    Los Angeles, California.

14            Said envelope was then sealed and deposited in the

15 United States mail at Ventura, California, the county in which

16 I am employed, on September 23, 1965, with the postage

17 thereon fully prepaid;

18            I declare under penalty of perjury that the fore-

19 going is true and correct.

20            Executed at Ventura, California, on September 23,

21 1965.

22                    Sophia DeLesdernier  
23                    SOPHIA DeLESdernier

24

25

26



IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

COUNTY OF VENTURA  
APPELLANT,

v.

O. V. BLACKBURN  
APPELLEE

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

---

REPLY BRIEF FOR APPELLANT

---

WOODRUFF J. DEEM  
District Attorney

HERBERT L. ASHBY  
Assistant District Attorney

KARL H. BERTELSEN  
Deputy District Attorney

County of Ventura  
Courthouse  
Ventura, California

---

FILED

NOV 1964

U.S. DISTRICT COURT





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Ventura, California



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1 IN THE UNITED STATES COURT OF APPEALS  
2 FOR THE NINTH CIRCUIT  
3

4 No. 20275

5 COUNTY OF VENTURA, APPELLANT

6 v.

7 O. V. BLACKBURN, APPELLEE  
8

9 ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
10 SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION  
11

12 REPLY BRIEF FOR APPELLANT  
13

14 STATEMENT OF THE CASE

15 In the appellee's brief Blackburn contends that the  
16 statement of the case contained in the County's brief differs  
17 from the "Findings of Fact" and from the "evidence" (Blackburn  
18 Br. 1). The appellant's statement of the case need not be a  
19 verbatim restatement of the findings of fact drafted by the  
20 prevailing party below. It is respectfully submitted that  
21 the County's brief does fairly state the facts and the develop-  
22 ment of the case.

23 In an effort to show an alleged misstatement of  
24 facts in the County's brief, Blackburn cites as "evidence"  
25 his answers to pretrial interrogatories (Blackburn Br. 1, 3, 4,  
26 5-6). The answers to the interrogatories, however, were not



1 admitted in evidence at the trial. Blackburn's answers  
2 would not be admissible in evidence on his own behalf but  
3 would be rejected as self-serving hearsay. See Haskell Plumb-  
4 ing & Heating Co. v. Weeks, 237 F.2d 263, 267 (9th Cir. 1956).  
5 When Blackburn's attorney offered to stipulate the interroga-  
6 tories and answers into evidence, the judge stated that he  
7 did not think they were material (R.Tr. 102) and the County  
8 did not stipulate that they could be admitted in evidence.  
9 Thus the answers to interrogatories are not "evidence" in  
10 this case.

11           An examination of the County's brief and the record  
12 reveals that the "misstatements of facts" which Blackburn  
13 points out are really only differing opinions and conclusions.  
14 The one real misstatement he points to (Blackburn Br. 2) is  
15 actually an error in favor of Blackburn rather than the  
16 County. Renie testified to the value of the copyright on the  
17 map prior to the agreement (R.Tr. 79), whereas we stated that  
18 he testified to the value of the map (County Br. 4, lines 7-  
19 10). If the map was worth a certain amount, the exclusive  
20 right to copy, print, publish and sell it would surely be  
21 worth as much or more.

22           Blackburn's brief contains several erroneous state-  
23 ments and citations to the record. For example he contends  
24 that all persons involved in negotiating the agreement saw  
25 the copyright notices on the negatives (Blackburn Br. 2). But  
26 there is no evidence that anyone other than Blackburn actually



1 saw them. The only copyright notices on the eight negatives  
2 are contained in what Blackburn calls his "big titles" (R.  
3 Tr. 26, 35). These titles are approximately 2 inches high  
4 and 13½ inches long (See P. Exs. 2-A through 2-E). The word  
5 "copyright" is less than 1/8 of an inch high and 7/8 of an  
6 inch long. The eight negatives are all approximately 33  
7 inches wide and vary in length from approximately 6 feet to  
8 13 feet. The titles are not located on the map itself but  
9 are located in the blank areas at the bottom or top of the  
10 negatives. Thus it certainly cannot be said that everyone  
11 who looked at these large negatives necessarily saw the 1/8  
12 inch by 7/8 inch word "copyright." If the "big titles" were  
13 visible at all when the negatives were provided to the County,  
14 the fact that they were placed at random on the negatives  
15 (for example, P. Ex. 2-A has five of these "titles" printed  
16 sideways in the lower left corner of the negative) may have  
17 led an observer interested in the map to believe that they  
18 were surplusage placed there for Blackburn's own use (see  
19 R.Tr. 19) and therefore to fail to see the small word "copy-  
20 right."

21 Blackburn did not demonstrate that any of the eight  
22 negatives contained copyright notices when they were provided  
23 to the County, as his brief contends (Blackburn Br. 2). Three  
24 of the eight photographic negatives (P. Exs. 2-A to 2-H) do  
25 not now contain copyright notices (R.Tr. 25, 31, 34; P. Exs.  
26 2-F, 2-G, 2-H). He testified to, but clearly did not





1 demonstrate, the condition of any of the negatives at the  
2 time they were provided to the County under the agreement.  
3 It is interesting to note that prior to the trial Blackburn  
4 stated that copyright notices were "affixed when made; at  
5 top and bottom of negatives in fourteen different places . .  
6 . ." (R. 66). Five of the negatives (P. Exs. 2-A through  
7 2-E) do now contain the "big titles" in a total of fourteen  
8 different places, but the only evidence that the other three  
9 negatives ever contained any copyright notices or that any of  
10 them contained notices when provided to the County was  
11 Blackburn's testimony (R.Tr. 18-44).

12 Blackburn states that two negatives do not contain  
13 copyright notices (Blackburn Br. 11), whereas in fact three  
14 of the eight have no notices (P. Exs. 2-F, 2-G, 2-H; R.Tr.  
15 25, 31, 34). In several places he cites pages of the record  
16 or transcript which do not support the proposition stated  
17 (e.g. Blackburn Br. 6 citing R.Tr. 69; Br. 14 citing R.Tr. 66;  
18 Br. 14 citing R.Tr. 36). At one point he accuses the County  
19 of misquoting the record (Blackburn Br. 22) but fails to men-  
20 tion where the alleged misquotation is to be found.

21 THE COPYRIGHTABILITY OF THE MAP AND THE  
22 OBLIGATION OF THE COUNTY TO AFFIX COPY-  
23 RIGHT NOTICES WERE DECIDED BY THE TRIAL  
24 COURT AS ISSUES OF LAW.

25 In an apparent effort to divert attention from the  
26 fact that the trial court decided the issues of copyright-  
ability and the obligation to affix copyright notices as



1 issues of law only, Blackburn contends that the County's  
2 brief makes "a strained and erroneous interpretation of the  
3 Court's ruling" which is "by no means a 'holding'" (Blackburn  
4 Br. 2-3), "an out of context, oblique gesture towards the  
5 trial judge" (Blackburn Br. 4) and an "attempted implication  
6 derogatory to the trial judge" (Blackburn Br. 10). A fair-  
7 minded reading of the County's brief indicates an effort to  
8 demonstrate that these issues were decided by the trial judge  
9 as issues of law upon the pleadings and stipulated facts at  
10 the commencement of the trial. They were not decided upon  
11 conflicting evidence or any testimony at the trial. All of  
12 the evidence on these issues which was before the trial judge  
13 is before this Court and is in the same form.

14           Blackburn conveniently ignores the fact that the  
15 question of whether the map contained sufficient original and  
16 creative work to be copyrightable under the laws of the United  
17 States was stipulated in the pretrial conference order to be  
18 an issue of law (R. 148, lines 18-20). The question whether  
19 the County was obligated under the contract or the law to  
20 affix copyright notices was also stipulated to be an issue of  
21 law (R. 147, line 11 - 148, line 7). None of the "issues of  
22 fact remaining to be litigated" in the pretrial conference  
23 order (R. 145, line 27 - 146, line 10) related to copyright-  
24 ability of the map. The only "issue of fact remaining" re-  
25 lated to whether the County was obligated under the agreement  
26 to affix copyright notices was whether copyright notices had



1 been discussed by Blackburn and any agent of the County (R.  
2 145, line 31 - 146, line 3). The trial judge obviously de-  
3 cided that even if they had not been discussed, the County  
4 would be under an obligation to affix notices because the  
5 subject of the agreement was a map in which Blackburn claimed  
6 a copyright (R.Tr. 12-13, 14.)

7 The finding of fact (drafted by Blackburn's attor-  
8 ney) relating to copyrightability is merely a direct quota-  
9 tion of the admitted facts in the pretrial conference order  
10 (R. 162, lines 10-23; 144, line 28 - 145, line 9). The find-  
11 ing of fact relating to the agreement is also a direct quota-  
12 tion of the admitted facts in the pretrial conference order  
13 (R. 160, lines 20-26; 143, lines 9-15). The trial court also  
14 found that copyright notices were not discussed by Blackburn  
15 and any agent of the County (R. 163, lines 18-20). The County  
16 does not urge that any of these findings of fact should be  
17 reversed.

18 It is clear that the District Court in holding at  
19 the commencement of the trial that the map was copyrightable  
20 and that the County had an obligation under the contract and  
21 the law to affix copyright notices was deciding issues of law.  
22 The trial judge stated that he was disposing of law issues  
23 (R.Tr. 9, lines 11-14) and construing the written agreement  
24 (R.Tr. 12, line 23 - 13, line 6; 14, lines 15-17). He was  
25 not "merely voicing generalities with a view to orienting his  
26 mind to the trial of the case before him" (Blackburn Br. 3).





1 He was deciding issues of law as stipulated in the pretrial  
2 conference order (R. 147-149) and was narrowing the factual  
3 issue to be tried to whether Blackburn "waived his copyright"  
4 by giving the County photographic negatives without copyright  
5 notices (R.Tr. 13, lines 3-6; 15, line 25 - 16, line 4; 17,  
6 lines 6-8) and to the amount of damages (R.Tr. 17, lines 9-10).  
7 It certainly is not derogatory of a trial judge to state that  
8 he decided issues of law upon stipulated facts at the commence-  
9 ment of the trial.

10 The point, which Blackburn attempts to obscure, is  
11 that the District Court decided issues of law and that this  
12 Court therefore is not being asked to review findings of fact  
13 based upon conflicting evidence or the testimony of witnesses.

14  
15 MERELY COPYING FROM SEVERAL SOURCES IS  
16 NOT SUFFICIENT ORIGINALITY AND CREATIVITY  
OF LAW.

17 In arguing that Blackburn's map does not contain  
18 sufficient original and creative work to be copyrightable  
19 under the law of the United States, the County does not dis-  
20 regard "with barefaced, unabashed abandon, its own lawyers'  
21 contract" (Blackburn Br. 4). It is the County's and Black-  
22 burn's contract, not "its own lawyer's contract," and it no-  
23 where states that Blackburn's map contains sufficient original  
24 and creative work to be copyrightable. It nowhere states that  
25 Blackburn is the proprietor of a copyright or that the County  
26 recognizes as valid any claim which Blackburn may make to a



1 copyright.

2           The fact that the County paid Blackburn one thousand  
3 nine hundred dollars (\$1,900) for a copy of the map and the  
4 right to reproduce and sell copies of the map certainly does  
5 not establish that the map contains sufficient original and  
6 creative work to be copyrightable under the law of the United  
7 States. Neither the contract nor any statement therein makes  
8 the map copyrightable or estops the County from asserting that  
9 it is not copyrightable. See Sawyer v. Crowell Pub. Co.,  
10 46 F.Supp. 471, 473 (S.D.N.Y. 1942). And the District Court  
11 correctly so concluded (R. 166, lines 18-19).

12           Blackburn's problem is that the only evidence of  
13 originality and creativity, the admitted facts (R. 144-145) and  
14 the identical findings of fact (R. 163, lines 10-23), shows  
15 nothing more than actual copying of various sources. The  
16 evidence does not show "something more than a 'mere trivial'  
17 variation, something recognizably 'his own'" (Blackburn Br.  
18 5), or any "problems of tying the maps together, adjustment  
19 of scales, elimination of much material from the source"  
20 (Blackburn Br. 8) or any other original and creative work by  
21 Blackburn. In an apparent effort to create some evidence of  
22 originality, he quotes his answer to an interrogatory and  
23 cites the reporter's transcript of the trial as the source of  
24 the statement (Blackburn Br. 5-6). But even if this self-  
25 serving hearsay were evidence, it does not show any creative  
26 or original work on his part beyond mere actual copying from



1 various sources.

2 Thus, it is clear that the District Court's conclu-  
3 sion that the map was copyrightable was in fact based upon  
4 the erroneous premise that as a matter of law merely copying  
5 from three or more sources is sufficient original and creative  
6 work to make a map copyrightable.

7 A COVENANT TO AFFIX COPYRIGHT NOTICES  
8 WILL NOT BE IMPLIED AGAINST A PARTY TO  
9 AN AGREEMENT FOR THE SOLE PURPOSE OF  
10 MAKING THAT PARTY LIABLE IN DAMAGES TO  
11 THE OTHER PARTY FOR COPYRIGHT INFRINGEMENT.

12 Blackburn places great emphasis on the word "dupli-  
13 cate" in the agreement (Blackburn Br. 2, 9-10, 11, 15). The  
14 agreement (P. Ex. 1; R. 5-6; County Br. App. A) does talk of  
15 duplicate tracings of the map. But it says nothing about  
16 duplicate tracings of Blackburn's "big titles" or duplicate  
17 tracings of the negatives. The County obviously was inter-  
18 ested in buying, and Blackburn in selling rights to the map,  
19 not to Blackburn's "big titles." An examination of the nega-  
20 tives (P. Exs. 2-A through 2-H) reveals that the "big titles"  
21 were not an integral or necessary part of the map contained  
22 on the negatives. The random and unusual placement of the  
23 "big titles" on the negatives indicates that they were placed  
24 there for Blackburn's own use (R.Tr. 19, 55-56) and were not  
25 a part of the map involved in the agreement. The omission of  
26 the "big titles" from the duplicate tracings of the map there-  
fore does not make them anything other than duplicate tracings  
of the map.





1 Blackburn is apparently attempting to suggest that  
2 the inadvertent omission of a single dot or line of the map  
3 from a copy would prevent it from being a duplicate tracing  
4 of the map and would make it an infringement of the copyright.  
5 This rationale certainly requires a highly technical, strained  
6 and unreasonable interpretation of the words "duplicate trac-  
7 ing of the map." But even with Blackburn's interpretation of  
8 the phrase, the fact remains that the "big titles" were not a  
9 necessary or integral part of the map. The agreement says  
10 duplicate tracings of the map and that is precisely what the  
11 linen tracings (P. Ex. 2-A-1 through 2-H-8) are despite the  
12 absence of Blackburn's "big titles" with the little copyright  
13 notices.

14 The County certainly has not forgotten its earlier  
15 position that the copyright notices were not on the negatives  
16 or were blocked out before they were given to the County, as  
17 suggested by Blackburn (Blackburn Br. 11). We have not urged  
18 this defense on appeal for the simple reason that Blackburn  
19 testified that they were on the negatives when delivered to  
20 the County (R.Tr. 18-44) and the trial court so found (R. 163,  
21 lines 6-8). We are aware of the difficulties in overturning  
22 a finding of fact for lack of substantial evidence.

23 Blackburn quotes at length from National Comics  
24 Publications v. Fawcett Publications, 191 F.2d 594, 600 (2d  
25 Cir. 1951) and then completely ignores or misunderstands what  
26 he has quoted by stating that "if any 'forfeiture' occurred



1 . . . [it] must have been caused by the [County's] wrongfully  
2 failing to put the notice on the maps" (Blackburn Br. 14).  
3 The whole point of the National Comics case is that a licen-  
4 see's wrongfully failing to put on notices (i.e., in breach  
5 of a promise exacted by the copyright proprietor to affix no-  
6 tices) does not cause a forfeiture of the copyright. Thus if  
7 the County wrongfully failed to put on notices, there was no  
8 forfeiture of the copyright. Whether publication without  
9 copyright notices by a licensee causes a forfeiture depends  
10 upon whether the proprietor exacted a promise to affix notices  
11 from the licensee and whether section 21 of the Copyright Act  
12 saves the copyright. Blackburn, of course, did not exact such  
13 a promise from the County, so the County did not wrongfully  
14 fail to put on notices. . Whether the copyright was forfeited  
15 depends upon whether section 21 applies, but that need not be  
16 decided in this case. The issue here is whether the omission  
17 of notices from copies reproduced by the County was wrongful.

18 The agreement says nothing about copyright notices.  
19 They were never discussed (R. 163, lines 18-20) and there is  
20 no evidence that Mr. Rice or any other agent of the County saw  
21 the 1/8 inch by 7/8 inch word "copyright" which Blackburn said  
22 was on the negatives. The County had purchased copies of  
23 maps from Blackburn in prior years (R.Tr. 71, lines 5-12)  
24 which may have contained the "title" referred to in the agree-  
25 ment.

26 Although it may be safe to assume that the County's



1 "legal staff knew more about contracts than did Blackburn"  
2 (Blackburn Br. 15), it certainly is not safe to assume that  
3 the County District Attorney's staff knew more about copy-  
4 rights, copyright notices and copyright licenses than did  
5 Blackburn. Blackburn has been in the map-making business for  
6 himself since 1927 (R.Tr. 45, lines 17-19) and has brought  
7 at least one other copyright infringement suit. Blackburn v.  
8 Southern California Gas Co., 14 F.Supp. 553 (S.D.Cal. 1936).  
9 One of the attorneys for Blackburn in that suit was named  
10 Porter C. Blackburn.

11 In Warner Bros. v. Columbia Broadcasting System,  
12 Inc., 216 F.2d 945 (9th Cir. 1954), Warner was claiming that  
13 it had acquired the exclusive right to use individual charac-  
14 ters and their names together with the title of a book under  
15 a lengthy agreement in which it bought certain movie, radio  
16 and television rights. This court held that even if Warner  
17 had been assigned the complete copyright it would not have  
18 the exclusive right to the characters, because they were only  
19 the vehicle of the story and were not within the area of pro-  
20 tection afforded by copyright. Here the County does not claim  
21 any exclusive rights or any right protected by copyright other  
22 than the right to reproduce and to sell copies of the map.  
23 The agreement is not a lengthy and detailed document drafted  
24 by a group of experts on copyright law and the publishing  
25 business. The County claims simply that this short and  
26 straightforward agreement does not require the County to affix





1 copyright notices.

2 Blackburn's implied negative covenant argument  
3 (Blackburn Br. 16-18) completely misses the point. The only  
4 reason for implying a covenant in this case is to make the  
5 County an infringer of copyright and liable for money damages.  
6 Implying a covenant to affix notices will not restore the  
7 value of the copyright because the County still has the right  
8 to reproduce and sell copies to the public at prices determined  
9 by the County. Such a covenant will not protect Blackburn  
10 from the competition of the County for sales of the map. It  
11 will not enable Blackburn to transfer any exclusive rights to  
12 anyone else. None of the cases cited by Blackburn implies a  
13 covenant to affix notices for the sole purpose of making a  
14 licensee liable in damages for copyright infringement.

15 If the law would imply a promise to affix notices  
16 where the agreement is silent merely because the subject of  
17 the agreement is copyrighted material, there was no need for  
18 Judge Hand to remand the National Comics case to determine  
19 whether the copyright proprietor had exacted a promise to af-  
20 fix notices from the licensee. Thus it is clear that the  
21 County is not, as a matter of law, under an obligation to af-  
22 fix copyright notices because the subject of the agreement was  
23 a map in which Blackburn claims a copyright.

24 SECTION 10 OF THE COPYRIGHT ACT DOES NOT  
25 IN ITSELF IMPOSE UPON THE COUNTY AN OB-  
26 LIGATION TO AFFIX COPYRIGHT NOTICES.

Blackburn apparently argues (Blackburn Br. 19-20)



1 that even if he had expressly authorized the County to omit  
2 the copyright notices, the County would be liable for in-  
3 fringement because section 10 of the Copyright Act imposes a  
4 "mandatory duty" to affix notices. Section 10, he seems to  
5 say, makes such a contract illegal and void. Presumably under  
6 his rationale a copyright proprietor is barred from ever dedi-  
7 cating his work to the public because section 10 imposes a  
8 "mandatory duty" to affix notices. Blackburn's interpretation  
9 of section 10 is so patently erroneous that it needs no  
10 further answer.

11 The cases he cites do not hold or even suggest that  
12 section 10 of the Copyright Act in and of itself (or any other  
13 law) makes a licensee or assignee who prints without copyright  
14 notices liable in damages to the copyright proprietor for in-  
15 fringement of copyright. On the contrary, these cases hold  
16 that the burden is upon the proprietor of the copyright to en-  
17 sure that proper copyright notices are affixed or to pay the  
18 price implied by the language of section 10, i.e. loss of  
19 the protection of the Copyright Act. See annot., 84 A.L.R.2d  
20 462 (1960), "Abandonment of Statutory Copyright."

21 THE DISTRICT COURT FAILED TO DETERMINE  
22 THE AMOUNT OF DAMAGE CAUSED BY THE  
23 ABSENCE OF COPYRIGHT NOTICES FROM COPIES  
24 OF THE MAP DURING THE STATUTORY PERIOD.

25 Blackburn relies upon certain statements by Renie  
26 and himself (Blackburn Br. 21) as showing that the absence of  
notices during the statutory period was the only and entire



1 cause of the loss in value of the copyright. The hypothetical  
2 question put to Renie, however, included among other facts  
3 the passage of eight or nine years and the sale to the County  
4 in 1956 of the right to reproduce and sell copies to the pub-  
5 lic at prices to be determined by the County (R.Tr. 80). As  
6 Blackburn's attorney states, Renie testified that the value  
7 "was destroyed by the facts narrated and assumed by him from  
8 the hypothetical question put" (Blackburn Br. 27). Thus, he  
9 did not testify as to the amount of the loss in value caused  
10 by the absence of copyright notices from copies reproduced by  
11 the County during the period of the statute of limitations.  
12 Contrary to Renie's statement (R.Tr. 82), a copyright cannot  
13 be cast into the public domain by the omission or removal of  
14 copyright notices by some third party without the consent or  
15 authorization of the owner. See American Press Ass'n v. Daily  
16 Story Pub. Co., 120 Fed. 766 (7th Cir. 1902); Scarves by Vera,  
17 Inc., v. American Handbags, Inc., 188 F.Supp. 255 (S.D.N.Y.  
18 1960). Whether Blackburn's copyright was cast into the pub-  
19 lic domain by his failure to exact a promise to affix notices  
20 depends upon whether section 21 of the Copyright Act can be  
21 applied to save it.

22 Blackburn also testified to the value of the copy-  
23 right before the agreement with the County and to the value  
24 at the time of trial. He did not testify as to the amount of  
25 the loss in value caused by the absence of notices during the  
26 statutory period. On cross-examination he attempted to evade





1 the question as to what had been the effect of the agreement  
2 alone on the value of the copyright (R. Tr. 71-75).

3 The County does not urge that there is no evidence  
4 of any loss in the value of the copyright since 1954 or that  
5 loss in value as such is not an appropriate measure of damages  
6 when properly applied. The point is that Blackburn is en-  
7 titled only to damages caused by the absence of notices during  
8 the statutory period (i.e. those "suffered due to the in-  
9 fringement"). 17 U.S.C. 101, 115.

10 Designating a conclusion of law as a finding of  
11 fact does not, of course, make it a finding of fact. To the  
12 extent that "Finding" XV (R. 164) is really a finding of fact,  
13 the County's position is that in making the finding the trial  
14 court misconceived the law and failed to apportion the loss  
15 in value between the various causes. There is no evidence as  
16 to the amount of the loss in value caused by the absence of  
17 notices during the statutory period. No consideration was  
18 given to the amount of the loss in value which was caused by  
19 the transfer of rights to the County in 1956, by depreciation  
20 in value over the years, by Blackburn's failure to keep his  
21 map current and up to date or by any other factors. The Dis-  
22 trict Court erroneously concluded that the County was liable  
23 for the entire loss in value regardless of the various causes  
24 for such loss.

25 If this judgment stands, the County will be paying  
26 Blackburn's estimate of the full market value of the copyright



1 and yet will still be subject to future suits for infringe-  
2 ment. Blackburn suggests (Blackburn Br. 28) that the changes  
3 made on the map over the years by the County are further in-  
4 fringements, and the trial judge suggested that Blackburn may  
5 recover from others who may copy his map. Thus the County  
6 faces the possibility of paying for "infringements" of this  
7 copyright even after it has paid Blackburn his estimate of  
8 the full market value of the entire copyright. Such a result  
9 is neither fair nor just.

#### 10 CONCLUSION

11 For these reasons it is respectfully submitted the  
12 judgment below should be reversed with directions to enter  
13 judgment in favor of the County and costs and attorney's fees  
14 should be awarded to the County.

15 WOODRUFF J. DEEM  
16 District Attorney

17 HERBERT L. ASHBY  
18 Assistant District Attorney

19 KARL H. BERTELSEN  
20 Deputy District Attorney

21 County of Ventura  
22 Courthouse  
23 Ventura, California

24 November 1965.



1                   C E R T I F I C A T I O N

2           I certify that, in connection with the preparation  
3 of this brief, I have examined Rules 18 and 19 of the United  
4 States Court of Appeals for the Ninth Circuit, and that, in  
5 my opinion, the foregoing brief is in full compliance with  
6 those rules.

7  
8                   Karl H. Bertelsen

9                   KARL H. BERTELSEN  
10                  Deputy District Attorney  
11                  County of Ventura  
12                  State of California  
13  
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1                   DECLARATION OF SERVICE BY MAIL

2

3           I, SOPHIA DeLESDERNIER, declare:

4           I am a citizen of the United States, over 18 years  
5 of age, and not a party to the within cause; my business ad-  
6 dress is 501 Poli Street, Ventura, California; I served three  
7 copies of the attached reply brief for appellant on George R.  
8 Maury, attorney for appellee, by placing same in an envelope  
9 addressed as follows:

10                               George R. Maury, Esq.  
11                               Suite 910  
12                               3440 Wilshire  
                              Los Angeles, California.

13           Said envelope was then sealed and deposited in the  
14 United States mail at Ventura, California, the county in which  
15 I am employed, on November 5, 1965, with the postage  
16 thereon fully prepaid;

17           I declare under penalty of perjury that the fore-  
18 going is true and correct.

19           Executed at Ventura, California, on November 5,  
20 1965.

21  
22                               Sophia DeLesdernier  
23                               \_\_\_\_\_  
                              SOPHIA DeLESDERNIER



IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

AERO SPACELINES, INC. , a corporation,

Appellee.

---

BRIEF FOR THE APPELLANT

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APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
CENTRAL DIVISION

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MANUEL L. REAL,  
United States Attorney,  
FREDERICK M. BROSIO, JR. ,  
Assistant U. S. Attorney,  
Chief of Civil Division,  
CAROLYN M. REYNOLDS,  
Assistant U. S. Attorney,

600 U. S. Courthouse ,  
312 North Spring Street,  
Los Angeles, Calif. 90012,

Attorneys for Appellant,  
United States of America.

**FILED**

OCT 1 1965

FRANK H. SCHMID, CLERK



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FOR THE NINTH CIRCUIT

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United States Attorney,  
FREDERICK M. BROSIO, JR.,  
Assistant U. S. Attorney,  
Chief of Civil Division,  
CAROLYN M. REYNOLDS,  
Assistant U. S. Attorney,

600 U. S. Courthouse,  
312 North Spring Street,  
Los Angeles, Calif. 90012,

Attorneys for Appellant,  
United States of America.





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MANUEL L. REAL,  
United States Attorney,  
FREDERICK M. BROSIO, JR.,  
Assistant U. S. Attorney,  
Chief of Civil Division,  
CAROLYN M. REYNOLDS,  
Assistant U. S. Attorney,

600 U. S. Courthouse,  
312 North Spring Street,  
Los Angeles, Calif. 90012,

Attorneys for Appellant,  
United States of America.



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No. 20, 274

IN THE

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FOR THE NINTH CIRCUIT

---

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Appellee.

---

BRIEF FOR THE APPELLANT

---

JURISDICTION

This action was brought by appellant to recover a civil penalty from appellee in the sum of \$3,000.00 as provided by Section 901(a) of the Federal Aviation Act of 1958, as amended, by 49 U.S.C. 1471(a)(1), for three violations of Civil Air Regulation 45.2, 14 C.F.R. 45.2. Jurisdiction was conferred upon the District Court by Section 1007(b) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. 1487(b), and by Title 28, U.S.C. 1345.

Both appellant and appellee filed motions for summary



judgment, and on April 30, 1965 a judgment was entered by the United States District Court, Southern District of California, Central Division, in favor of appellee. Findings of Fact and Conclusions of Law were also filed on April 30, 1965. Appellant's Notice of Appeal was filed on June 23, 1965.

This court's jurisdiction rests upon 28 U.S.C. 1291.

### STATEMENT OF THE CASE

This appeal involves the sole question of whether the aircraft here in question was a "public aircraft", as that term is defined in the Federal Aviation Act of 1958, as amended, <sup>1/</sup> thereby rendering the Federal Aviation Act inapplicable to the aircraft and the appellee (as owner-operator of the aircraft) not subject to the jurisdiction or control of the Federal Aviation Administrator (herein, Administrator).

Heretofore, the term "public aircraft" has never been interpreted by any court. Consequently, this is a case of first impression.

This action was commenced by appellant on October 14, 1964, by the filing of a complaint (T. 2-4) to recover a total civil penalty of \$3,000 from appellee under Section 901(a) <sup>2/</sup> of the

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<sup>1/</sup> 49 U.S.C., Sec. 1301(30)

<sup>2/</sup> Title 49 U.S.C.A. 1471(a)(1) provides, in pertinent part, that:

"Any person who violates ... any provision of subchapter VI [Safety Regulations of Civil Aeronautics] ... of this chapter [Chapter 20, Federal Aviation

(continued)





Federal Aviation Act of 1958, as amended, 49 U.S.C. 1471(a) for three violations of Section 45.2 of the Civil Air Regulations, 14 C.F.R. 45.2. <sup>3/</sup>

The three violations set forth in the complaint took place, respectively, on September 20, 1963, October 26, 1963, and October 30, 1963, and in each instance involved the operation by the appellee of the same Boeing B-377PG, civil aircraft N1024 V, in the carrying for compensation (for the National Aeronautics and Space Administration, herein, NASA) of very substantial tonnages from Air Force Bases in California to similar Federal installations in Florida and Alabama, while the appellee did not hold a commercial operator certificate issued by the Administrator of the Federal Aviation Agency pursuant to Civil Air Regulation 45.2. <sup>4/</sup>

On March 18, 1965, both the Appellant (T. 8-25) and the

---

<sup>2/</sup> (Cont'd) Program] or any rule, regulation, or order issued thereunder . . . shall be subject to a civil penalty of not to exceed \$1,000 for each such violation."

<sup>3/</sup> Civil Air Regulation 45.2, 14 C.F.R. 45.2 (Revised as of January 1, 1963) reads in pertinent part:

"No person subject to the provisions of this part [covering Commercial Operator Certification and Operation Rules] shall engage in air commerce using aircraft of more than 12,500 pounds maximum certificated take-off weight until he has obtained from the Administrator a commercial operator certificate; . . .

<sup>4/</sup> Supra.



appellee (T. 26-53) filed motions for summary judgment, along with a Stipulation of Facts and Issue (T. 54-68), wherein the following, undisputed facts were presented to the court:

The appellee, a California corporation, voluntarily undertook to redesign and modify a Boeing B-377 to meet the needs of the National Aeronautics and Space Administration and other governmental or private organizations in transporting large-sized cargo. The resulting aircraft, Boeing B-377PG, is the subject of this proceeding (T. 55, lines 11-15).

Until the appellee developed the aircraft, there did not exist any aircraft capable of handling and transporting extremely large cargo such as was used by NASA in the space program (T. 55, lines 16-19).

On May 16, 1963, the aircraft B-377PG was flown for the first time by the appellee in its modified form (T. 56, lines 5-6) and on May 28, 1963 appellee entered into a contract with NASA (T. 64).

This initial contract was to end July 31, 1963, subject to extension by NASA until August 31, 1963, covering a portion of the period during which tests of the aircraft were undertaken to determine if it was airworthy. Also, tests required by NASA were pursued to determine the feasibility of using such an aircraft to handle and transport spacecraft modules, missiles, components and related cargo (T. 56, lines 12-22).

On July 10, 1963, the Federal Aviation Agency (herein, FAA) issued a Certificate of Airworthiness for the aircraft



(T. 65), and on September 6, 1963 NASA and appellee entered into a contract for "Air Transportation Services" (T. 67) for the term September 1, 1963 through June 30, 1964. The three violations alleged in the complaint arose during this time when appellee operated the aircraft pursuant to its contract with NASA without obtaining a Commercial Operator Certificate from the Administrator.

On February 20, 1963 (before the contracts with NASA), appellee applied to the FAA for a Commercial Operator Certificate (T. 61) and, although it did not withdraw this application, at the times of the flights here in question the appellee notified the FAA that it was not required to secure a Commercial Operator Certificate because the aircraft was a "public aircraft" under the terms of the contract with NASA (T. 57, lines 26-32). During the same time, it was the stated position of the FAA and its Administrator that the operation of the aircraft required certification of appellee as a commercial operator under the appropriate regulations issued by the Administrator (T. 57, lines 21-26).

After the flights here in question, the appellee did obtain Commercial Operator Certificate No. WE 68(c) from the FAA effective November 13, 1963 (T. 58, lines 1-3).

Since completion of the modification and successful flight of Boeing B-377 PG to the date of the complaint herein, no movement of said aircraft was made except at the direction and for the use of NASA, exclusive of crew training or check flights of which the FAA was advised (T. 58, lines 23--27).





The Federal Aviation Act of 1958, as amended, 49 U.S.C.A. 1301, et seq., restricts the applicability of Part 45 of the Civil Air Regulations (Commercial Operator Certificate) to "civil aircraft" (T. 55, lines 3-5), thereby being inapplicable to "public aircraft."

The appellee has admitted operating the aircraft on the three specified dates without a Commercial Operator Certificate (T. 57, line 15).

The appellee has also admitted that on each of the flights the aircraft weighed "more than 12,500 pounds maximum certificated take-off weight" (T. 7, lines 7 and 14), and, that the appellee is liable for the maximum civil penalty of \$3,000.00 "if the aircraft is found not to be a public aircraft ..." (T. 57, lines 14-20).

Based upon the above-recited, undisputed facts, the following issue of law was presented to the District Court:

Is the aircraft subject of this action a public aircraft as defined in the Federal Aviation Act by virtue of the provisions for its use under the contract with NASA and its use by that agency of the Federal Government? (T. 59, lines 4-8).

On April 30, 1965, the District Court entered judgment for appellee, decreeing "that at the times mentioned in the complaint defendant's aircraft B-377PG was a 'public aircraft' as that term is used in Section 101(30) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. Section 1301(30), and,



accordingly, at such times the Federal Aviation Act was not applicable to said aircraft and defendant was not subject to the jurisdiction or control of the Federal Aviation Administrator" (T. 74-75). Findings of Fact and Conclusions of Law were also filed on April 30, 1965 (T. 69-73). This appeal followed.

### STATUTES AND REGULATIONS INVOLVED

1. Title 49, U.S.C.A., Sec. 1301

(14) "Civil Aircraft" means any aircraft other than a public aircraft;

(30) "Public Aircraft" means an aircraft used exclusively in the service of any government or of any political subdivision thereof, including the government of any state, territory, or possession of the United States or the District of Columbia, but not including any government-owned aircraft engaged in carrying persons or property for commercial purposes.

2. Civil Air Regulation 45.2, 14 CFR 45.2 (Revised as of January 1, 1963) reads in pertinent part:

No person subject to the provisions of this part [covering Commercial Operator Certification and Operation Rules] shall engage in air commerce using aircraft of more than 12,500 pounds maximum certificated take-off weight until he has obtained from the Administrator a commercial operator certificate.



## SPECIFICATION OF ERRORS RELIED ON

1. The District Court erred in holding that Aircraft B-377PG was a public aircraft (T. 73, line 6).

2. The District Court erred in holding that appellee, as owner of aircraft B-377PG, was not required under the Federal Aviation Act, or any regulation thereunder of the Federal Aviation Administrator, to hold a Commercial Operator Certificate (T. 73, lines 12-15)

3. The District Court erred in finding that, by reason of the provisions of the Grant of Exemption, the Certificate of Airworthiness, the Restricted Operating Limitations, the contracts with NASA, and the use to which aircraft B-377PG was required to be put, said aircraft was at the time here material used exclusively in the service of the United States Government (T. 72, lines 19-24).

## QUESTION PRESENTED

Whether an aircraft, privately owned and operated as a commercial venture, becomes a "public aircraft" within the meaning of 49 U. S. C.A. 1301 (30) because of a contract for its use by a government agency.





## ARGUMENT

### Summary of the Argument

In enacting the Federal Aviation Act of 1958, Congress created the Federal Aviation Agency for the purpose of prescribing uniform rules and regulations for the use of navigable air space for all users -- civil and military. It also authorized the Administrator of that agency to prescribe minimum rules and regulations and standards of safety for civil aircraft.

The Act defines a third category of aircraft, i.e. "public aircraft", but does not purport to give the Federal Aviation Agency, or any other agency, jurisdiction over such an aircraft or its operator.

The appellee, owner and operator of Boeing B-377PG, entered into two "Air Transportation Services" contracts with NASA wherein appellee was to furnish the aircraft, flight crews, other necessary personnel and insurance for the purpose of transporting materials for NASA.

From these contracts and the use to which the aircraft was put, the District Court ruled that the aircraft was a "public aircraft", and therefore, the appellee was not subject to the regulatory control of the Federal Aviation Administrator.

Appellant contends herein that the District Court's ruling is in error, since Congress did not intend that an aircraft privately owned and operated as a commercial venture be classified as a "public aircraft" merely because it is under contract to



a government agency.

Congress gave the Federal Aviation Agency and its Admini-  
power to regulate and control "civil aircraft. " To say that the  
contracts between appellee and NASA converted an otherwise  
"civil aircraft" into a "public aircraft" is to allow one government  
agency to contract away the powers and duties given by Congress  
to another agency.

Even if one agency could, by contract, establish an air-  
craft as being a "public aircraft", the contracts involved herein  
do not show such an intent by NASA. In return for its services,  
appellee was to receive an estimated contract price of  
\$995,884.00 from NASA. From the contracts, it can be seen that  
appellee was engaged in a commercial venture and that NASA did  
not consider the aircraft as being other than a "civil aircraft"  
subject to the Federal Aviation Act of 1958.

# I

A GOVERNMENT AGENCY CANNOT, BY  
CONTRACT, ESTABLISH THE STATUS OF  
A PRIVATELY-OWNED AIRCRAFT AS  
BEING EITHER A PUBLIC OR CIVIL  
AIRCRAFT.

---

The District Court held that aircraft B-377PG was a  
"public aircraft" after finding (T. 72, lines 19-24) that "By  
reason of the provisions of . . . the contracts with NASA and  
the use to which aircraft B-377PG was required to be put, said



aircraft was at the times here material used exclusively in the service of the United States Government. "

If we follow this reasoning, then we have the anomalous situation of one government agency contracting-away the powers and duties given by Congress to another agency. It is certainly apparent that if the same contracts (T. 64 and 67) were entered into between appellee and another corporation or individual, the aircraft here in question would be a civil aircraft. But, because the other contracting party is a government agency, the court has concluded that this is not a civil aircraft and therefore the appellee was not required to obtain Part 45 Certification and was not subject to all of the safety and operating provisions of the Federal Aviation Act of 1958, as amended, nor to the rules and regulations of the Administrator.

The legislative history of the Federal Aviation Act of 1958, as amended, shows that Congress intended to create one Federal agency which would prescribe uniform rules and regulations for the use of the navigable air space. The Committee on Interstate and Foreign Commerce in its House Report No. 2360, Vol. II, U. S. Code Congressional and Administrative News, p. 3741 (85th Cong., 2nd Sess. 1958), stated:

"Clearly an agency is needed now to develop a sound national policy regarding use of navigable air space by all users -- civil and military. This agency must combine under one independent administrative head functions in that field now exercised by the





President, the Department of the Defense, the Department of Commerce, and the Civil Aeronautics Board. " (at page 3744)

In commenting upon the scope of the duties of the Administrator of the Federal Aviation Act, the legislative history, at p. 3756, supra, states:

" . . . the authority of the Administrator under this title (Title VI -- Safety Regulations of Civil Aeronautics) with respect to prescribing minimum rules and regulations and standards of safety is expressly limited to civil aircraft. For this reason, section 601(a)(7) of the existing law (relating to the authority of the Administrator to prescribe air-traffic rules) has been omitted from this title and such authority is now contained in section 307(c) of Title III of the Committee Amendment and applies to both civil and military aircraft. " (Parenthesis added)

The airplane here is not a military plane, and if it is not a civil aircraft either, then it is not subject to the Federal Aviation Agency Administrator's rules regarding standards of safety and air traffic.

One of the regulations established by the Administrator of the Federal Aviation Agency for larger civil aircraft is that the operator of said aircraft must obtain a Commercial Operator's Certificate under Part 45 of the Civil Air Regulations. It is the



failure of the appellee to obtain this certificate before flying the aircraft that is the basis for this action. Therefore, we will attempt to analyze the requirements and necessity for this certificate.

Subsection 2 of Part 45, requires the certification of the civil aircraft operator "using aircraft of more than 12, 500 pounds maximum certificated take-off weight." All operators subject to the provisions of Part 45 are then subject, among other things, to the following regulations:

Part 45.10 -- An authorized representative of the Administrator shall be permitted at any time and place to make inspections or examinations (including inspections and examinations of financial books and records) to determine an operator's compliance with the requirements of the Federal Aviation Act of 1958, as amended, the Civil Air Regulations, the provisions of the operator's operating certificate, and the operations specifications, or to determine the operator's eligibility to continue to hold a certificate.

Part 45.11 -- (a) except as provided in paragraph (b) of this section (relating to common carriers), all persons subject to the provisions of this part shall, in the conduct of operations subject hereto, comply with the operating requirements of Part 42 of this subchapter as heretofore or hereafter amended. Operating requirements shall be deemed



to include requirements relating to aircraft and equipment, maintenance, flight crew, flight time limitations, flight operation, aircraft operating limitations, and related record-keeping and reporting requirements. (Parenthesis added)

Therefore, certification under Part 45 gives the Administrator authority to inspect the facilities of an operator of an aircraft with more than 12,500 pounds maximum certificated take-off weight if that operator is not already subject to the rules relating to common carriers, and to determine whether the operator has complied with all the minimum standards of safety prescribed by the Administrator. Since the appellee is not a common carrier, the only way it becomes subject to this control by the Administrator is through the issuance of the Part 45 certification.

The legislative history of the Federal Aviation Act of 1958, p. 3741, supra, shows that the purpose of the Act is "to establish a new Federal agency with powers adequate to enable it to provide for a safe and efficient use of the navigable air space by both civil and military operations." Clearly, Congress wanted to establish an agency which would develop comprehensive rules regulating all flight, but if we are to allow appellee's argument that this is a "public" aircraft then the operator of that aircraft does not have to conform to those rules and regulations laid down by the Administrator for the safe and efficient use of the navigable air space.





If the operator of an aircraft the size of the one involved herein is to be excepted from compliance with the requirements of the Federal Aviation Act of 1958, as amended, and the rules, regulations and standards of safety prescribed by the Administrator, something more than the entering into of an "Air Transportation Services" contract with a government agency should be required. Since the contract does not undertake to specify all the rules and regulations that will apply to the operator, and the aircraft is not a military plane under the jurisdiction of the Department of War, what set of rules are to apply to the operator of the aircraft if the Federal Aviation Act does not apply?

It would be contrary to the express intent of Congress in enacting the Federal Aviation Act for the purpose of creating a "sound national policy regarding use of navigable air space by all users" to say that a government agency that enters into a contract with a private corporation for the use of an aircraft has thereby converted that airplane into a "public aircraft" and relieved the owner thereof of complying with the regulations and standards of safety prescribed by the FAA Administrator.



## II

ASSUMING, IN ARGUENDO, THAT A PUBLIC AGENCY COULD ESTABLISH THE STATUS OF AN AIRCRAFT BY CONTRACTING WITH A PRIVATE CORPORATION, THE CONTRACTS HERE DO NOT SHOW SUCH AN INTENT BY NASA.

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In the initial contract entered into between appellee and NASA on May 28, 1963 (T. 64), there are numerous provisions to show that NASA considered the airplane to be a civil aircraft. The pertinent clauses in the contract are as follows:

1. On the first page of the contract, it states that the contract is for "Air Transportation Services."
2. Article IV, page 4 - Flight Operations, Subsection B, provides:

"Contractor shall submit no later than midnight Thursday of each week a plan of operational movements for the next succeeding week until the aircraft has been formally certificated by the Federal Aviation Authority (FAA) . . . . After FAA certification, all movements of the aircraft shall be authorized by the Contracting Officer on a trip by trip basis."

Since the certification of an aircraft is required of civil aircraft only under Part 42 of the Civil Air Regulations, this provision would be unnecessary if NASA considered the airplane to be a public aircraft.

3. Article V, page 5 - Performance Requirements



and Payment, Subsection B:

"Contractor shall put forth his best effort to obtain formal FAA certification of this aircraft by June 27, 1963. A copy of the FAA certification will be furnished the Contracting Officer on or before June 27, 1963. In the event the contractor has not obtained the FAA certification of airworthiness for this aircraft by June 27, 1963, the period of performance of this contract shall automatically be extended by a number of days equal to the days of delay beyond June 27, 1963. In no event, however, shall the term of this contract extend beyond August 31, 1963."

Again, this is a provision relating to certification of the aircraft by the FAA, which certification would not be required of a public aircraft.

4. Article IX, page 6 - Maintenance, Subsection B:

"Necessary maintenance including preventive maintenance will be accomplished by properly FAA qualified maintenance personnel in strict accordance with the FAA Air Carriers' Approved Maintenance Program."

The FAA Air Carrier Approved Maintenance Program applies to civil aircraft only.

5. Article XII, page 7 - Safety Standards:

"The contractor shall be solely responsible





for compliance with all safety standards and the level of maintenance and repair required to meet the safety standards prescribed by applicable FAA/CAB Regulations; provided, however, that the Contracting Officer shall have authority to direct additional measures if such is necessary in his opinion to assure safety of the aircraft passengers or cargo." (Emphasis added)

As discussed in paragraph I, supra, it is the obtaining of a commercial operator's certificate under Part 45 of the Civil Air Regulations that brings the operator of an aircraft under the supervision of the Administrator of the Federal Aviation Agency as to safety standards. The safety standards prescribed by the applicable Federal Aviation Agency regulations apply only to civil aircraft and therefore, would not be applicable if this were a public aircraft.

6. Article XIV, page 7 - Compliance with Applicable Laws:

"The contractor shall procure all necessary permits and licenses; obey and abide by all applicable laws, regulations and ordinances and all other rules of the United States of America, and of the state wherein the services are performed, or any other duly constituted public authority. . . ."

If NASA considered this aircraft to be a public aircraft the provision here relating to "necessary permits and licenses" and



to "regulations" would be unnecessary since no permits or licenses are prescribed for public aircraft nor are there any regulations relating to them.

In view of the foregoing provisions in the initial contract, it is clear that NASA did not consider this aircraft to be anything but a civil aircraft.

It should be noted that by the time the second contract was entered into between NASA and appellee (T. 67) the appellee had secured certification of the aircraft under Part 42 of Civil Air Regulations as required of civil aircraft (T. 65) and was continuing to process its application for a Part 45 Commercial Operator Certificate. This application for a Part 45 certificate was never withdrawn by defendant and NASA intended that Aero Spacelines, Inc., obtained this certificate as an operator of a civil aircraft, as it clearly indicated by the contract entered into September 6, 1963 (T. 67).

As to this latter contract, it is conceded that Article I provides that defendant is to "furnish to the Government for its exclusive use and control one each B-377 PG aircraft, Serial No. N1024V." But, in the remaining articles, there are numerous provisions to indicate that NASA did not intend nor did it, in fact create a public aircraft by this contract, as is shown by the following provisions of the contract:

1. The first page of the Contract states that it is a contract for "air transportation services," thus, indicating something different from a contract



for the use of an aircraft only.

2. Paragraph C of Article V gives the Government "the right to utilize this aircraft for additional miles not to exceed 16,000 miles per month for a total of 23,000 per month during the term of this contract."

Such a provision, which is essentially an option to NASA, would appear unnecessary if the aircraft by contract was "exclusively used" by NASA.

3. Although Article IV provides that all movements of the aircraft shall be at the direction of the Contracting Officer, it also provides that the defendant shall furnish the aircraft "within 48 hours after receipt of notice from the Contracting Officer." Furthermore, Article VII provides that if the Contractor "fails to respond to a trip requested by the Contracting Officer within the time allowed in Article IV," the minimum guaranteed mileage per month is thereby reduced by estimated mileage of the trip requested. (Emphasis added)

Again, these provisions would appear unnecessary if NASA truly had exclusive use of the aircraft at all times.

4. Although Article IV states that all movements of the aircraft shall be at the direction of the Contracting Officer, it is obvious from Article I and Article II (C) that the responsibility for the flight





operations actually rests with the contractor.

Furthermore, Article IX places the entire responsibility upon Aero Spacelines, Inc. to perform maintenance "in strict accordance with the FAA approved Maintenance Manual."

5. Article XIII of the contract places the sole responsibility upon Aero Spacelines to comply with all safety standards prescribed by the applicable FAA/CAB regulations.

Since the FAA standards of safety are limited to civil aircraft only, this provision would be unnecessary if NASA really intended this aircraft to be a public aircraft.

6. Aero Spacelines, Inc., by Article XV, is required to obtain all the necessary permits and licenses as well as to comply with all applicable laws of the United States and of any state.

7. By virtue of Article I, Aero Spacelines, Inc. is an independent contractor and not an agent of the Government and by Article XV all employees of the contractor assigned to perform the work of the contract are to be considered employees of the contractor at all times and not of the government.

8. Article XII requires Aero Spacelines to obtain passenger-public liability and property damage insurance; Article XVI provides that the contractor will hold the government harmless from any and all



claims arising from or incident to the work of the contract; and Article XVII provides that Aero Spacelines shall be liable for injury or damage "to personnel or cargo carried under this contract. "

9. Article II (E) requires that Aero Spacelines produce, among other items, "FAA manuals which cover certification of the aircraft", and "performance data as submitted for aircraft certification. "

In the contract, such provisions as Article IX (B) requiring that the aircraft be maintained in strict accordance with the "FAA approved maintenance program" indicates that the aircraft was considered to be a civil aircraft since, if it was not a civil aircraft, the FAA maintenance program would not be applicable.

If it were the intention of NASA to use the aircraft as a public aircraft, it would be unnecessary for NASA to have required that Aero Spacelines, Inc. obtain liability and property damage insurance or to place responsibility upon Aero Spacelines, Inc. for injury or damage to "personnel or cargo carried under the contract" (Article XVII) because the government is by long-standing policy a self-insurer.

Despite the use of the term "exclusive use" in Article I, it does not appear from other provisions in the contract that NASA legally had exclusive use of the aircraft. For example, assume that in any given month NASA found use for the aircraft for the minimum number of miles of 7,000, which would constitute 1-1/2



round trips from Los Angeles to Cape Kennedy. In such a situation, assuming that it would take two days to load the aircraft in Los Angeles, one day enroute and one day ground time at Cape Kennedy for turn-around, the entire 7,000 mile minimum guaranteed portion of the contract could be performed within approximately eight days. Thus, Aero Spacelines conceivably would be free to "use" the aircraft during the remaining 22 or so days of the month, so long as NASA did not exercise its option for any of the additional 16,000 miles. Assuming further, however, that NASA exercised its option in the contract (Article V (C) ) to use the aircraft for an additional 16,000 miles in any given month, the contract could be completely performed with an estimated 24 or 25 days in that month and, again, used by Aero Spacelines for other contractual operations during that month. Despite the requirements that all movements of the aircraft must be at the direction of the Contracting Officer, it would seem that the "48-hour notice" to furnish the aircraft, coupled with the penalty for failure to "respond to a trip" (Article VII), indicates that Aero Spacelines might use the aircraft for any other purpose at any time so long as it could meet the 48-hour notice requirement or suffer the reduction in its guaranteed mileage. Certainly it is possible that the appellee could obtain such a good offer for some other use of the aircraft that it would be financially advantageous for it to ignore the requirement that all movements of the aircraft must be at the direction of the Contracting Officer and accept the penalty of a reduction in the guarantee payment.





### III

#### CONGRESS INTENDED THE TERM "CIVIL AIRCRAFT" TO APPLY TO AN AIRCRAFT USED FOR COMMERCIAL PURPOSES OF THE OPERATOR.

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The statutory definition of a phrase should not be construed in such a mechanical fashion as to defeat a major purpose of the statute.

Lawson v. Swanee Fruit & S. S. Co., et al,

336 U. S. 198;

Case v. Bowles, 327 U. S. 92;

United States v. Kurzenknabe, 136 F. Supp. 17.

The definition of "public aircraft" is one which is used exclusively in the services of any government, "but not including any government-owned aircraft engaged in carrying persons or property for commercial purposes. " 49 U. S. C. A. 1301 (30) (Emphasis added).

Specific provision was, therefore, made for the exact opposite factual situation than is involved herein, i. e. a government-owned aircraft that is leased (or otherwise used) in a commercial venture. Certainly if the government leased one of its planes to a private corporation for the carrying of goods and received a remuneration therefor, the aircraft would fall within the above-quoted exception to the definition of "public aircraft" and the private lessee-operator would be required to obtain a Commercial Operator's Certificate.



Although no express exception was made by Congress for the situation involved herein, i. e. where the government contracts for the non-military, non-emergency use of an airplane with a private corporation, it must be remembered that this is the first such contract and, even though this aircraft is used by the government, this use is for commercial purposes as far as the appellee-operator is concerned (as is amply demonstrated by the amount of the consideration provided by the contracts) (T. 64 and 67).

Since Congress has defined "public aircraft" in terms of the use to which the aircraft is put, it does not seem logical to say that a government-owned aircraft under the same contract to a private corporation would be a civil aircraft while this one is a public aircraft because it is engaged by a government agency. This type of approach would ignore the fact that as to the appellee-operator the primary use of the aircraft is for commercial purposes.

Although no direct explanation or interpretation of the terms "public aircraft" or "civil aircraft" could be found in the federal statutes, the following definitions used in international treaties and agreements provide some insight into Congress' use of the terms:

THE BASES AGREEMENT, 1948, between the  
United States, United Kingdom and Northern  
Ireland (62 Stat. (2) 1860).

Article XIV -- "Civil Aircraft" means



aircraft other than those used in military, customs or police services.

CONVENTION ON INTERNATIONAL CIVIL AVIATION (THE CHICAGO CONVENTION, 1946, signed by the U. S. in 1944), Department of State Publication No. 2282.

Article 3 -- (a) This convention shall be applicable only to civil aircraft and shall not be applicable to state aircraft.

(b) Aircraft used in military, customs, and police service shall be deemed to be state aircraft.

Although "public aircraft" was not used, the term "civil aircraft" was specifically defined in The Bases Agreement, supra, as being aircraft other than those used in military, customs, or police service. Since this agreement had to be ratified by the United States Senate, this definition cannot be ignored. Certainly, if Congress employed the same term in enacting federal laws, it must have intended the same or a similar definition to apply and, under that definition, the aircraft herein would be a civil aircraft, since it is not "used in military, customs, or police services." (That NASA is not a military organization is shown by the legislative history of the National Aeronautics and Space Act of 1958, U. S. Code and Admin. News, 85th Cong. 2nd Sess., 1958, page 3160, at 3166).





Since the definitions of "public aircraft" and "civil aircraft" revolve around the use of the aircraft, an aircraft used exclusively by the government is a public aircraft only if that use is not for commercial purposes. If it is for commercial purposes of the operator, then it must be a civil aircraft. The soundness of this interpretation is more apparent when the definition of "civil aircraft" in the Bases Agreement is considered, since that definition also looks to the use of an aircraft and impliedly includes all aircraft used for commercial purposes.

### CONCLUSION

When the ultimate finding, as in the instant case, is a conclusion of law, or at least a determination of a mixed question of law and fact, on review, the Court of Appeals may substitute its judgment for that of the trial court. Bogardus v. Commissioner, 302 U.S. 34, 39; United States v. Anderson, 108 F.2d 475, 478, 479 (7th Cir. 1939), and in either case the Court of Appeals may reverse with a direction to find for the appellant.

For the reasons stated herein, it is respectfully submitted that the District Court's judgment in favor of appellee



be reversed, and the cause remanded with instructions to enter judgment for the appellant.

Respectfully submitted,

MANUEL L. REAL  
United States Attorney

FREDERICK M. BROSIO, JR.  
Assistant U. S. Attorney  
Chief of Civil Division

CAROLYN M. REYNOLDS  
Assistant U. S. Attorney

Attorneys for Appellant  
600 U.S. Courthouse  
312 North Spring Street  
Los Angeles, Calif. 90012

#### CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Carolyn M. Reynolds  
CAROLYN M. REYNOLDS  
Assistant U. S. Attorney



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UNITED STATES OF AMERICA,

Appellant,

vs.

AERO SPACELINES, INC., a corporation,

Appellee.

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BRIEF FOR APPELLEE

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APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
CENTRAL DIVISION

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FILED

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FRANK H. SCHMID, CLERK

JONES and BEDNAR

5901 West Third Street  
Los Angeles, California 90036

Attorneys for Appellee,  
Aero Spacelines, Inc.,  
a corporation.





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JONES and BEDNAR

5901 West Third Street  
Los Angeles, California 90036

Attorneys for Appellee,  
Aero Spacelines, Inc.,  
a corporation.



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Appellant,

vs.

AERO SPACELINES, INC., a corporation,

Appellee.

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BRIEF FOR APPELLEE

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JURISDICTION

Appellant instituted this action on October 14, 1964 to recover from appellee civil penalties of \$3,000.00, under the provisions of 49 U. S. C. A. 1471(a) of the Federal Aviation Act of 1958 as amended (49 U. S. C. A. 1301 et seq.). The penalties sought to be imposed are applicable to three flights of appellee's aircraft BOEING B 377 PG, on September 20, 1963, October 26, 1963, which were asserted to have been made in violation of Civil Air Regulation 45.2 (14 C.F.R. 45.2) promulgated by the Federal Aviation Administrator.

The amount of the penalty for each flight constitutes the maximum penalty which may be imposed under 49 U. S. C. A.



1471(a).

Jurisdiction was conferred upon the District Court by Sec. 1487(b) of 49 U. S. C. A. (the Federal Aviation Act as amended) and by Title 28, U. S. C. A. Sec. 1345.

Both parties to this proceeding filed motions for summary judgment in the lower court, and on April 30, 1965, Findings of Fact and Conclusions of Law were signed and filed, and on the same day a judgment was entered by the United States District Court, Southern District of California, Central Division, in favor of appellee.

Appellant's Notice of Appeal was filed June 23, 1965. The jurisdiction of this court is conferred by Title 28, Sec. 1291.

### STATUTES AND REGULATIONS INVOLVED

In addition to the statutes and regulations cited by appellant, the following are pertinent to this matter:

1. 49 U.S. C. A. Sec. 1421:

"(a) The Administrator is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time:

\* \* \*

"(6) Such reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedure,





as the Administrator may find necessary to provide adequately for national security and safety in air commerce.

\* \* \*

### "Exemptions

"(c) The Administrator from time to time may grant exemptions from the requirements of any rule or regulation prescribed under this subchapter if he finds that such action would be in the public interest."

2. 49 U.S. C. A. Sec. 1423:

\* \* \*

### Airworthiness certificates

"(c) The registered owner of any aircraft may file with the Administrator an application for an airworthiness certificate for such aircraft. If the Administrator finds that the aircraft conforms to the type certificate therefor, and, after inspection, that the aircraft is in condition for safe operation, he shall issue an airworthiness certificate. The Administrator may prescribe in such certificate the duration of such certificate, the type of service for which the aircraft may be used, and such other terms, conditions, and limitations, as are required in the interest of safety. Each such certificate shall be



registered by the Administrator and shall set forth such information as the Administrator may deem advisable. The certificate number, or such other individual designation as may be required by the Administrator, shall be displayed upon each aircraft in accordance with regulations prescribed by the Administrator."

3. 49 U.S.C.A. Sec. 1430:

"(a) It shall be unlawful --

"(1) For any person to operate in air commerce any civil aircraft for which there is not currently in effect an airworthiness certificate, or in violation of the terms of any such certificate;

\* \* \*

"(5) For any person to operate aircraft in air commerce in violation of any other rule, regulation, or certificate of the Administrator under this subchapter; and . . ."

\* \* \*

QUESTION PRESENTED

Was the aircraft -- subject of this proceeding -- a "public aircraft", as defined under the Federal Aviation Act (49 U.S.C.A.



1301) by virtue of the provisions for its use in the contracts with NASA, and its use by that Agency of the Federal Government.

## ARGUMENT

### Summary of Argument

Historically, legislation adopted by the Federal Government with respect to the use of navigable air space has provided for three categories of aircraft, namely: military aircraft, public aircraft and civil aircraft.

In all Federal aviation legislation, public aircraft has been defined similarly and in every instance the use of such aircraft has been the determinative factor of its characteristics. Appellee contends the utilization of its aircraft is conclusive under the Federal Aviation Act as to its character and that such utilization made of aircraft BOEING B-377 PG a public aircraft. As such the aircraft is exempt from the regulatory control of the Federal Aviation Administrator, since his and the Federal Aviation Agency's jurisdiction is confined solely to "civil aircraft" (49 U.S.C.A. 1303(e) and 1421; T. 54, line 31 to T. 55, line 5).

Appellee also contends the statute here involved under which the government instituted its suit for penalties, is a penal statute to be strictly construed against the government and which must be clear and certain for its application.





FEDERAL AVIATION LEGISLATION PRIOR TO  
THE FEDERAL AVIATION ACT OF 1958 HAS  
COVERED "PUBLIC AIRCRAFT" IN A MANNER  
CONSISTENT WITH THE CURRENT STATUTORY  
DEFINITION THEREOF.

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The first legislation adopted by the Federal Government pertaining to Federal aviation and control of flight over the United States and its possessions, was the Air Commerce Act of 1926. A legislative history of this Act was compiled by Frederick E. Lee of the Office of Legislative Counsel of the United States Senate and is found in 2 U. S. Aviation Reports, page 117 and following. The Air Commerce Act was enacted on May 20, 1926, 69th Congress, 44 Stat. 568, after considerable legislative action by the Senate and House of Representatives.

Section 21 of the Senate Bill (S-41) provided:

"This Act shall not apply to aircraft owned or operated by the United States."

The House of Representatives proposed an amendment to the Senate Bill involving a slightly different approach, which contained a separate provision as to exempt aircraft.

Section (3) of the House amendment provided, in part:

"EXEMPT AIRCRAFT. -- (a) The Secretary of Commerce shall exempt from the requirements of regulations under section 2, except requirements as to registration or as to air traffic rules upon



established airways: (1) Public aircraft of the United States and airmen serving solely in connection therewith and air navigation facilities owned or operated by the United States or any governmental instrumentality thereof and used exclusively (except for emergency public use as provided in Section 5) in the service of the Federal Government; \* \* \*."

Section 10 of the House amendment contained definitions, two of which apposite here are:

"(d) The term 'public aircraft' means an aircraft used exclusively in the governmental service.

"(e) The term 'civil aircraft' means any aircraft other than a public aircraft."

The final Senate Bill incorporated identical definitions to the above.

It is significant that where the Senate originally provided the Act was inapplicable to aircraft "owned or operated by the United States", the House amendment and final Act exempted public aircraft which was defined to mean "an aircraft used exclusively in the governmental service" (our emphasis).

Parenthetically it is to be observed the foregoing definitions are substantially identical to the definitions of the same terms in the Federal Aviation Act of 1958, 49 U.S.C.A. Sec. 1301 (14) and (30) with which we are here concerned.



In the report accompanying Senate Bill 41, the origin of the Air Commerce Act of 1926, it was said:

"1. The bill relates solely to civil air navigation."

2 U. S. Aviation Repts., 145.

"6. Public aircraft. -- Under the Senate Bill public aircraft were exempt from all the regulatory interstate and foreign commerce requirements of the Act. Under the House amendment public aircraft were exempt in respect of all navigation from the requirements as to airworthiness and the rating of airmen, but not from air traffic rules upon civil airways nor from registration. Under the substitute, public aircraft of the Federal Government are exempt from the airworthiness requirements and the regulations as to the rating of airmen, unless such aircraft are voluntarily registered; but public aircraft of the Federal Government are not exempt from the air traffic rules, except insofar as the Secretary of War has control over exclusively military aircraft upon military airways."

(2 U. S. Aviation Repts. 170.)

As technology in the aircraft industry moved forward the range of aircraft increased, and the ramifications of the use





thereof became broader it became necessary to upgrade federal legislation, which culminated in the Civil Aeronautics Act of 1938. A comprehensive study of this Act is to be found in Rhyne Civil Aeronautics Act, anno. (1939). That act contained definitions of 31 words and phrases, those pertinent here being as follows:

"(14) 'Civil Aircraft' means any aircraft other than public aircraft. "

"(30) 'Public aircraft' means an aircraft used exclusively in the service of any government or any political subdivision thereof, including the government of any State, Territory or possession of the United States, or the District of Columbia, but not including any government-owned aircraft engaged in carrying persons or property for commercial purposes. "

(Emphasis added.)

Here again emphasis has been placed by the legislators upon the exclusive use in governmental service as the determining characteristic of a public aircraft. It also is interesting to note the above definitions in the 1938 Civil Aeronautics Act have been carried in their entirety into the Federal Aviation Act of 1958, 49 U. S. C. A. Sec. 1301(14) and (30), and are identically numbered.

Prohibitive conduct and penalties therefor were prescribed in the Civil Aeronautics Act of 1938 by Sections 610 and 901.

Section 610(a) provided in part as follows:

"Sec. 610(a). It shall be unlawful --



"(1) For any person to operate in air commerce any civil aircraft for which there is not currently in effect an airworthiness certificate, or in violation of the terms of any such certificate; \* \* \*

"(5) For any person to operate aircraft in air commerce in violation of any other rule, regulation or certificate of the Authority under this title."

(Rhyne Civil Aeronautics Act, anno. p. 275.)

and Section 901(a) thereof provided:

"SEC. 901. (a) Any person who violates (1) any provision of Title V, VI, and VII of this Act, or any provision of subsection (a)(1) of section 11 of the Air Commerce Act of 1926, as amended, or (2) any rule or regulation issued by the Postmaster General under this Act, shall be subject to a civil penalty of not to exceed \$1,000 for each such violation. Any such penalty may be compromised by the Authority or the Postmaster General, as the case may be. The amount of such penalty, when finally determined, or the amount agreed upon in compromise, may be deducted from any sums owing by the United States to the person charged."

(Rhyne Civil Aeronautics Act, anno. p. 279.)

The language with respect to the above quoted prohibition is practically identical to the same numbered subparagraphs of



Section 1340(a) 49 U. S. C. A. pertaining to violations, and the provisions above quoted with respect to penalties are substantially the same as those found in Sec. 1471 of 49 U. S. C. A., the current Federal Aviation Act.

## II

### THE CONDITIONS GOVERNING THE USE OF BOEING AIRCRAFT B-377 PG, AND THE NASA CONTRACT PROVISIONS PERTAINING TO SUCH USE, ESTABLISHED ITS CHARACTERISTIC AS A "PUBLIC AIRCRAFT".

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Two contracts between the appellee and NASA are involved in this proceeding and are mentioned here in chronological order. These contracts and the conditions imposed as to the use of the aircraft are germane here.

#### 1. The contract of May 28, 1963.

Significant with respect to this contract are the events preceding and following its execution date. On January 24, 1962, appellee's predecessor filed an application for airworthiness certificate of Aircraft B-377 PG (T. 55, 60). On March 12, 1963, appellee filed its application for exemption under the airworthiness certificate from Parts 1 and 8 of the Civil Air Regulations (T. 55, 62). On May 2, 1963, the requested exemption from Parts 1 and 8 of the Civil Air Regulations was granted by the Federal Aviation Agency (T. 56, 63).





Thus, prior to the contract date, the exemption from Parts 1 and 8 of said regulations had been granted said aircraft (T. 63).

Certain language of the exemption (the entire Grant of Exemption being set forth in full in the transcript (T. 63)), is significant and pertinent to the exclusivity of use which so clearly constitutes the determinative factor of a public aircraft, and consists of the following:

"(1) The cargo shall consist solely of S-IV Saturn and Apollo spacecraft modules and related cargo;

"(2) The persons carried shall be restricted to the technicians designated by the National Aeronautics and Space Administration and carried to insure security and monitor loads to which cargo components are subjected in transit; and

"(3) Cargo and persons may be carried only between locations as prescribed by the National Aeronautics and Space Administration. \* \* \* "  
(emphasis added.)

The contract with NASA dated May 28, 1963 (T. 64), was entered into for the purpose of meeting feasibility tests by NASA (T. 56, lines 7-22) but it is obvious negotiations had preceded such contract date by a considerable period of time because of the prospective language therein pertaining to certification of



the aircraft. Portions of the contract language are also pertinent and they are:

"ARTICLE III - GOVERNMENT FURNISHED EQUIP-  
MENT AND PERSONNEL.

"A. EQUIPMENT: THE GOVERNMENT SHALL  
FURNISH GROUND SUPPORT EQUIPMENT  
AS REQUIRED TO DELIVER CARGOES TO,  
AND RECEIVE CARGOES FROM, THE AIR-  
CRAFT. THIS EQUIPMENT INCLUDES BUT  
IS NOT LIMITED TO:

- "1. LIFT TRAILERS FOR RAISING AND  
LOWERING OF CARGO TO AIRCRAFT  
FLOOR HEIGHT.
- "2. PALLETS, COMPATIBLE WITH SUPPORT  
RAILS IN THE AIRCRAFT, AND THE  
CARGOES.
- "3. SATURN S-IV DUMMY STAGE.
- "4. ALL NECESSARY FUEL AND OIL AS  
REQUIRED IN THE PERFORMANCE  
OF THIS CONTRACT.

"ARTICLE IV - FLIGHT OPERATIONS.

"A. DURING THE PERIOD OF PERFORM-  
ANCE, ALL MOVEMENTS OF THIS AIR-  
CRAFT SHALL HAVE THE ADVANCE  
APPROVAL OF THE CONTRACTING



OFFICER. THE CONTRACTOR SHALL FURNISH THE AIRCRAFT, FULLY STABILIZED, READY FOR LOADING, WITH FULL OPERATION CREW WITHIN 48 HOURS AFTER RECEIPT OF NOTICE FROM THE CONTRACTING OFFICER.

"B. THE CONTRACTOR SHALL SUBMIT NO LATER THAN MIDNIGHT THURSDAY OF EACH WEEK A PLAN OF OPERATIONAL MOVEMENTS FOR THE NEXT SUCCEEDING WEEK, UNTIL THE AIRCRAFT HAS BEEN FORMALLY CERTIFICATED BY THE FEDERAL AVIATION AUTHORITY (FAA).

\* \* \* AFTER FAA CERTIFICATION ALL MOVEMENTS OF THE AIRCRAFT SHALL BE AUTHORIZED BY THE CONTRACTING OFFICER ON A TRIP-BY-TRIP BASIS."

"ARTICLE V - PERFORMANCE REQUIREMENTS  
AND PAYMENT \* \* \*

"B. THE CONTRACTOR SHALL PUT FORTH HIS BEST EFFORT TO OBTAIN FORMAL FAA CERTIFICATION OF THIS AIRCRAFT BY JUNE 27, 1963. A COPY OF THE FAA CERTIFICATION WILL BE FURNISHED THE





CONTRACTING OFFICER ON OR BEFORE JUNE 27, 1963. IN THE EVENT THE CONTRACTOR HAS NOT OBTAINED THE FAA CERTIFICATION OF AIRWORTHINESS FOR THIS AIRCRAFT BY JUNE 27, 1963, THE PERIOD OF PERFORMANCE OF THIS CONTRACT SHALL AUTOMATICALLY BE EXTENDED BY A NUMBER OF DAYS EQUAL TO THE DAYS OF DELAY BEYOND JUNE 27, 1963. IN NO EVENT, HOWEVER, SHALL THE TERM OF THIS CONTRACT EXTEND BEYOND AUGUST 31, 1963. \* \* \* " (Emphasis added.)

From the excerpted contract language it appears clear the use of the B-377 PG Aircraft was to be exclusively that of NASA though the word "exclusive" is not in fact used in the first contract. As an example, during the performance period under the contract all movements of the aircraft required advance approval of the contracting officer, and among others of government furnished equipment are necessary fuel and oil for performance of the contract. Certainly the government would not supply fuel and oil for an aircraft to be used other than the government, and since all movements of the aircraft required approval of the contracting officer it is obvious the aircraft could not be used except for government purposes specified by the contracting officer.

The only reference in the first contract pertaining to



certification is that applicable to the aircraft itself. For example, Article IV B. speaks of "the aircraft" being "formally certificated" (T. 64) and "After FAA certification all movements of the aircraft \* \* \*"; (T. 64) and in Article V B. reference is made to obtaining "formal FAA certification of this aircraft" and if "certification of airworthiness for this aircraft" (T. 64) was not obtained by a certain date the performance period was extended. It seems manifest the government under the May 28, 1963, contract provided by apt language without using the exact words for its exclusive use of the aircraft, the government requiring only as to the aircraft an airworthiness certificate.

On July 10, 1963, the Certificate of Airworthiness was issued (T. 56, 65) and simultaneously the FAA issued Restricted Operating Limitations (T. 56, 66). The language of both these documents is also pertinent to the public aircraft question and all of such pertains to the exclusive use inquiry. The relevant language of the Airworthiness Certificate is:

"1. This aircraft is certificated only for the special purpose of carrying spacecraft modules, persons, and cargo for compensation or hire for the National Aeronautics and Space Administration.

(Ref. FAA Exemption 258 dated May 2, 1963; Regulatory Docket No. 1679)

"2. The operation of this aircraft for any purpose other than that for which it is certificated is prohibited.



"3. Operating Limitations dated July 10, 1963 are a part of this certificate." (T. 65)  
(Emphasis added.)

Restrictions contained in the Restricted Operating Limitations pertaining to the aircraft relevant to the use question are:

"1. The only flights authorized are for the special purpose of carrying spacecraft modules, persons and cargo for compensation or hire for the National Aeronautics and Space Administration, subject to the following conditions (Ref. FAA Exemption #258, dated May 2, 1963 - Regulatory Docket No. 1679):

"a. The cargo shall consist solely of S-IV Saturn and Apollo spacecraft modules and related cargo;

"b. The persons carried shall be restricted to the technicians designated by the National Aeronautics and Space Administration and carried to insure security and monitor loads to which cargo components and subject in transit; and

"c. Cargo and persons may be carried only between locations as prescribed by the National Aeronautics and Space Administration." (T. 66)(emphasis added,





except for word "only" in 1 above.)

In light of the restrictions contained in the exemptions from Parts 1 and 8 of the Civil Air Regulations (T. 63), the provisions of the May 28, 1963 contract (T. 64), the control thereunder of all movements of the aircraft, the limiting provisions of the Airworthiness Certificate (T. 65) and of the Restricted Operating Limitations (T. 66), it is submitted that on no logical basis can it be argued that BOEING B-377 PG was not "an aircraft used exclusively in the service of any government"?

2. The contract of September 6, 1963.

At the date of this contract all affirmative obligations imposed upon appellee under the May 28, 1963 contract had been performed, all of which, sofar as this controversy is concerned, pertained solely to the certification of the aircraft. As a consequence of such performance the Air Worthiness Certificate and the Restricted Operating Limitations, both applicable to the aircraft, were issued on July 10, 1963 (T. 56, lines 23-28 and T. 65 and 66).

Significant language of the September 6, 1963 contract pertinent to the use question here presented is as follows:

"ARTICLE I - GENERAL

"THE CONTRACTOR, AS AN INDEPENDENT CONTRACTOR AND NOT AS AN AGENT OF THE GOVERNMENT, SHALL, ON THE TERMS AND CONDITIONS HEREINAFTER MORE PARTICULARLY



SET FORTH, FURNISH TO THE GOVERNMENT FOR ITS EXCLUSIVE USE AND CONTROL ONE B-377 PG AIRCRAFT, SERIAL NO. M1024V AND FURNISH ALL PERSONNEL, FACILITIES, EQUIPMENT, AND MATERIALS, OTHER THAN MAY BE FURNISHED BY THE GOVERNMENT, NECESSARY FOR THE COMPLETE OPERATION AND MAINTENANCE OF THE AIRCRAFT IN ORDER TO PROVIDE AIR TRANSPORTATION OF S-IV STAGES, LARGE BOOSTER COMPONENTS, TOOLS, AND FIXTURES, AND SUCH OTHER CARGOES AS MAY BE SPECIFIED BY THE CONTRACTING OFFICER.

"ARTICLE II - CONTRACTOR FURNISHED EQUIPMENT AND PERSONNEL

"A. EQUIPMENT: THE CONTRACTOR SHALL FURNISH, FOR THE GOVERNMENT'S EXCLUSIVE USE AND CONTROL, ONE (1) CONVERTED BOEING 377 STRATOCRUISER AIRCRAFT (COMMONLY KNOWN AS THE 'PREGNANT GUPPY') WITH THE CAPACITIES, CAPABILITIES, AND/OR APPURTENANCES AS FOLLOWS:

"B. FUEL AND OIL: THE CONTRACTOR SHALL FURNISH ALL NECESSARY FUEL AND OIL REQUIRED IN THE PERFORMANCE OF THIS CONTRACT. THE CONTRACTOR SHALL BE AUTHORIZED



TO PURCHASE SUCH FUEL AND OIL FROM  
THE GOVERNMENT AT COST. \* \* \*

(Emphasis added except article heading.)

Subsequent to the date of the above contract, and on September 20, 1963, October 26, 1963, and October 30, 1963, three movements of the aircraft were undertaken for the purpose of transporting spacecraft hardware and missile components for NASA. These flights immediately brought to a head the opposed contentions of appellee and the FAA as to whether the aircraft was a public aircraft, and whether to operate said aircraft appellee was required to secure a Commercial Operator's Certificate (T. 57, lines 21-32 and T. 52, lines 7-19).

Under the contract appellee was obliged to "furnish to the government for its exclusive use and control" (Article I quoted above) and "furnish, for the government's exclusive use and control" (Article II A, above quoted) the aircraft in question. It is doubtful whether language of greater clarity could be composed which would more perfectly meet the definition of public aircraft under the Federal Aviation Act, 49 U.S.C.A. Sec. 1301 (30), that is to say, an aircraft used exclusively in the service of any government. An additional fact bearing on exclusive use by the government is supplied by the provisions under the September 6, 1963, contract whereunder the government supplied fuel and oil for the aircraft at cost. Where except in the interest of an exclusive governmental function is government property ever supplied





to a contractor at the government's cost?

Appellant repeatedly argues that a governmental agency cannot by virtue of contract establish the status of an aircraft subject to such contract. Appellee submits on the contrary that contractual provisions as such are immaterial and that the fact of use must be and is the determining factor under the definition of public aircraft in the Federal Aviation Act if as a consequence of such use the use is in fact exclusive by the government (and we assume there is no question that the use was by the United States Government through its agency, NASA).

### III

THE QUESTION OF CERTIFICATION IS TWO-FOLD, VIZ., CERTIFICATION OF THE AIRCRAFT AND CERTIFICATION OF THE OPERATOR OF AN AIRCRAFT, AND NEITHER IS MUTUALLY DEPENDENT UPON THE OTHER.

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The government has maintained it was necessary under the Federal Aviation Act that appellee comply with requirements pertaining to two types of certification, viz., (1) Airworthiness Certification of the aircraft and (2) certification of appellee as a commercial operator. In this respect, the government misconstrues the significance of certification, as is indicated by its assertion as a part of Item 2 on page 16 of its opening brief, that "Certification of an aircraft is required of civil aircraft only under Part 42 of the Civil Air Regulations," \* \* \*. The only statutory requirement for Airworthiness Certification is found in the



prohibition to operate a civil aircraft in air commerce without a currently effective Airworthiness Certificate in 49 U. S. C. Sec. 1430 (a)(1) and in the enabling provision of the Federal Aviation Act pertaining to such certificates and their issuance in 49 U. S. C. Sec. 1423.

The sole requirement pertaining to the Commercial Operator's Certificate is found in the rulings and regulations of the Administrator issued under the general rule and regulation-making power of such official. This authority is found in 49 U. S. C. Sec. 1421, which permits the Administrator in promoting the safety of flights of civil aircraft in air commerce to prescribe and revise from time to time reasonable rules and regulations. These are found for the most part in the Civil Air Regulations. In this proceeding appellee was cited for three violations of Part 42 of Civil Air Regulations, which requires the owner of a civil aircraft having more than 12,500 lbs. maximum certified take-off weight to possess a Commercial Operator Certificate. Authority for the penalties imposed here is therefore the prohibition found in 49 U. S. C. Sec. 1430 (a)(5) for any person to operate aircraft in air commerce in violation of any other rule or regulation of the Administrator. Thus on the certification question of defendant as a commercial operator as distinguished from certification of the aircraft, there is again raised the specter of civil versus public aircraft, the definitions of which are precise in the Federal Aviation Act, 49 U. S. C. Sec. 1301 (14) and (30). A solution of the question requires a determination of what constitutes a public



aircraft since, as defined, any aircraft other than a public aircraft is a civil aircraft (49 U. S. C. Sec. 1301 (14)).

The government contends the intention of NASA had a marked if not decisive bearing upon the determination of whether appellee was required to secure certification as a commercial operator in order to perform under the September 1963 contract and provide to NASA at its direction the exclusive use and control of the aircraft. If the intention of that agency of the Federal government has any bearing upon statutory interpretation, the only evidence of such with respect to certification which ever arose had to do with the airworthiness of the aircraft. Under the May 1963 contract as above noted, appellee undertook a number of contractual obligations. In brief, these referred to FAA certification of the aircraft, the meeting of FAA requirements for certification of the aircraft, the obtaining of FAA Certificate of Airworthiness (only applicable to the aircraft) and the meeting of maintenance and safety standards prescribed and approved by the FAA. The obligation undertaken to secure certification of the aircraft was fully performed and the Airworthiness Certificate required to be secured by appellee under the May 1963 agreement was issued nearly two months before the September 6, 1963 contract, and more than two months prior to the flights here in question. The Airworthiness Certificate issued by the Federal Aviation Agency limited utilization of the aircraft, and the restricted operating limitations issued at the same time as the Airworthiness Certificate imposed further restrictions impinging upon the use of the aircraft. In fact no use





of the aircraft could be made without the consent and pursuant to the direction of NASA, and then only to carry spacecraft modules, persons and cargo as prescribed by NASA.

During all the times the aircraft was in the course of modification and during its testing and feasibility studies, there existed great uncertainty as to whether at any time and in any event appellee as the operator of the aircraft was required to secure a Commercial Operator's Certificate. This in general parlance is paraphrased as certification of the operator. See the affidavit of John M. Conroy (T. 51, line 26 to p. 19, line 52; p. 57, lines 21-23). Because of this uncertainty the application of appellee's predecessor for a Commercial Operator's Certificate was never withdrawn and by appellee continued to be processed notwithstanding the controversy which existed as to the application of the Civil Air Regulations as to appellee sofar as its operations were concerned. It is submitted no reasonable consideration of the facts, the provisions of the September 1963 contract, the definition of public aircraft in the Federal Aviation Act, the comprehensive restrictions imposed with respect to the aircraft under the Grant of Exemption, the Airworthiness Certificate and the Restricted Operating Limitations admits of any conclusion except that appellee's aircraft was at the times of the flights in controversy a public aircraft and as such beyond the jurisdiction of the Federal Aviation Agency or its Administrator.

Accordingly imposition of the penalties here asserted must be denied because,



1. If asserted under 49 U.S. C. Sec. 1430 (a)(1) with respect to the Certificate of Airworthiness, such certificate had been issued and was outstanding as to the aircraft prior to the flights in question (T. 56, line 23);
2. If asserted under 49 U.S. C. Sec. 1430 (a)(5) with respect to the Commercial Operator's Certificate, which is solely a requirement of a regulation of the Administrator, said regulation is not here applicable because the jurisdiction of the Administrator and the act extend only to civil aircraft except in cases not here pertinent. The Administrator can issue regulations only with respect to Civil Aircraft, 49 U.S. C. Sec. 1420, and as indicated above, it is submitted Aircraft BOEING B-377 PG was at the time of the flights a "public aircraft".

#### IV

THE STATUTE HERE INVOLVED IS A PENAL STATUTE TO BE STRICTLY CONSTRUED AS AGAINST THE GOVERNMENT AND IT MUST BE CLEAR AND CERTAIN TO WARRANT PENALTIES THEREUNDER BEING ASSESSED AGAINST APPELLEE.

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49 U.S. C. Sec. 1471 provides that any person who violates any provision of the subchapters therein referred to, or any rule,



regulation or order issued thereunder, shall be subject to a civil penalty of not to exceed \$1,000 for each such violation. The only subchapter pertinent to this controversy is Subchapter VI. Section 1430 of 49 U. S. C., a part of Subchapter VI, provides in part:

"(a) It shall be unlawful --

"(1) For any reason to operate in air commerce any civil aircraft for which there is not currently in effect an airworthiness certificate, or in violation of the terms of any such certificate; \* \* \*

"(5) For any person to operate aircraft in air commerce in violation of any other rule, regulation, or certificate of the Administrator under this subchapter; and \* \* \*."

It is clear penalties assessed against appellee in this proceeding originate under the above portions of Sec. 1430, since the government has continuously maintained appellee's aircraft B-377 PG, notwithstanding the limitations upon its use under the Grant of Exemption, the Airworthiness Certificate, the Restricted Operating Limitations and the provisions pertaining to its use under both the contracts with NASA, is a civil aircraft, the operation of which by appellee requires both a Certificate of Airworthiness as to the plane and a Commercial Operator's Certificate for appellee as the owner of such plane. The complaint (T. 2-4) in fact identifies appellee's plane as a civil aircraft and the government could hardly contend to the contrary, since the





jurisdiction of the Federal Aviation Agency is in essence limited to civil aircraft.

The word "penal" in common use has been enlarged to include under the term "penal statutes" all laws that command or prohibit certain acts and establish penalties for their violation (Richter v. Empire Trust Co., 20 F.Supp. 289, D.C. N.Y.). In the matter at hand the above statute proscribes certain actions and provides a penalty therefor, the maximum of which is \$1,000 for each act.

A fundamental rule of statutory construction is that penal statutes must be construed strictly, i. e., construed in favor of the person sought to be subjected to their operation or strictly construed against the prosecution in favor of the person accused (United States v. Brown, 333 U.S. 18; United States v. Peoples, 50 F. Supp. 462, D.C., Cal.; United States v. Resnick, 299 U.S. 207) and such statutes will not be held to include offenses and persons other than those which are clearly described and provided for (United States v. Williams, 341 U.S. 70 and United States v. Resnick, supra). The transaction must be clearly within both the spirit and the letter of the statute to meet its prohibition, and if there be a fair doubt as to whether the charged act is embraced in such prohibition, resolution of the doubt is to be made in favor of the person against whom enforcement is sought. (Marchesi v. United States, 126 F.2d 671.) This certainty and definiteness in a penal statute is a paramount requirement and a prime requisite for its validity (Bain v. Fleck, 92 N.E.2d 770; Duhamel v. State



Tax Commission, 179 P.2d 252, Ariz. ). So if a person of ordinary intelligence cannot understand its meaning, or if reasonably minded persons cannot agree on its meaning, the statute will be deemed invalid for vagueness and uncertainty (State v. Jay J. Garfield Building Co., 3 P.2d 983, Ariz.; Ex parte Leach, 215 Cal. 536). The foregoing are fundamental rules of statutory interpretation and mean in essence that penal statutes must be clear and certain so as to provide ample notice of that which is comprehended within them to persons who may be subjected by virtue of their conduct to their prohibition. We submit the penal statute here concerned with is clear and admits of no strained or unusual interpretation. But if there exists a question as to the clarity of the statute such is to be resolved in favor of appellee under familiar rules of interpretation of penal statutes. A violation of Sec. 1471 gives right to the imposition of a penalty not to exceed \$1,000 for each act. The defined violations above noted apply to civil aircraft and, as previously observed, jurisdiction of the Federal Aviation Act comprehends only civil aircraft. A question of determination next ensues, i. e., what does the Federal Aviation Act mean by civil aircraft? References to the definitions disclose that a civil aircraft is any aircraft other than a public aircraft and it is then necessary to ascertain what is a public aircraft. We find under the definitions that such an aircraft (which is outside the jurisdiction of the Federal Aviation Act) is one "used exclusively in the service of any government". From the facts in this matter we must then ascertain whether BOEING B-377 PG at the times



involved here met the definition of public aircraft. We earnestly submit it does. Being a public aircraft, penalties under 49 U. S. C. Sec. 1471 and the listed violations under 49 U. S. C. Sec. 1430 are not here applicable.

## V

### APPELLEE'S ANSWERS TO ARGUMENTS OF APPELLANT.

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The appellant's arguments as presented in its brief and which appellee considers here in the order mentioned could be paraphrased as follows: (1) The government cannot through one of its agencies establish by contract the status of Aircraft B-377 PG; (2) even if the government through such agency by contract could so establish the status of the aircraft the contracts here show a contrary intent by NASA, and (3) Congress intended the term "civil aircraft" to apply to an aircraft used for commercial purposes of the operator.

As mentioned above, the statutory definitions of civil and public aircraft are simple, clear and understandable. The test, under the statute, is the use to which the aircraft is put, and what might occur under facts different than here presented appears quite immaterial.

The appellant complains that if the aircraft is not a civil aircraft then it is not subject to the Administrator's rules on safety and air traffic, and if not subject to those rules then the operator of the aircraft is not subject to other rules of the Administrator, for example, the examination of financial records and inspection





of the operator's facilities. Both these propositions are beside the point. Inspection of facilities of an operator by the Administrator is limited to one who operates a civil aircraft and thus we return to definitions. Contractual understandings between NASA and the appellee are not in themselves determinative - the only question to be answered has to do with the use to which the aircraft was put, and this is supplied by the facts and by the facts only, and not how the use came about. The facts in this matter are the subject of a stipulation (T. 54) to which reference must be made for a determination of the public aircraft question and nothing extraneous to such facts, we submit, is pertinent to this inquiry.

As was pointed out above, certification under the Federal Aviation Act involves (1) certification of the aircraft and (2) in certain cases outside the field of common carriers certification of the operator of specified aircraft.

All the references by appellant to portions of the two contracts with NASA are beside the point of what is or is not a public aircraft. How was the aircraft used is the salient point, and if so used in a manner to meet the terms of the statute defining public aircraft that would seem to end the matter.

It is fair to assume that both NASA and appellee were aware of hazards which could be encountered in the use of B-377 PG. Accordingly, certain standards were adopted by way of contract obligations to assure safety of plane, cargo, and authorized passengers. This then is the logical reason for the contractual undertakings pertaining to; airworthiness of the aircraft and



certification thereof; maintenance and preventive maintenance, compliance with safety standards, and level of maintenance and repair, all as required by the standards of FAA. We submit the contracting parties, cognizant of the need for appropriate safety and maintenance standards, adopted such in the contracts and in effect provided for FAA safety standards and requirements by reference.

From the outset there was uncertainty whether appellee was required to be certified as a commercial operator and for this very reason the application of its predecessor was never withdrawn but on the contrary continued to be processed by appellee (T. 71, line 17 to T. 72, line 5). Where does this indicate that "NASA intended" appellee to secure a Commercial Operator's Certificate?

Some significance is attributed by appellant to the fact the September 1963 contract provided a ceiling for mileage usage of Aircraft B-377 PG. The aircraft was to be furnished within forty-eight hours of notice from the contracting officer. Appellee had responsibility for meeting standards of safety and maintenance prescribed by FAA/CAB, and theoretically there existed a time -- twenty-two days in each month as calculated by appellant -- during which appellee would be "free to use" the aircraft for other contractual operations. All of the foregoing argument of the government is devoid of substance for it ignores a great many stipulated facts of real import, namely:

- (1) The Grant of Exemption from Parts 1 and 8 of Civil



Air Regulations (T. 58, line 16 and T. 63) limited cargo solely to the S-IV Saturn and Apollo spacecraft modules, restricted persons carried to those designated by NASA; and permitted cargo and persons only to be carried between locations as prescribed by NASA.

(2) The Airworthiness Certificate (of the aircraft) (T. 58, line 19; T. 65) limited certification of the aircraft only for the special purpose of carrying spacecraft modules, persons and cargo for NASA; prohibited operation of the aircraft for any other purpose; and incorporated as part of the certificate the operating limitations (Restricted Operating Limitations).

(3) The Restricted Operating Limitations (T. 58, line 20 and T. 66) provided that the only flights authorized were those for the special purpose of carrying spacecraft modules, persons and cargo for NASA, and limited cargo, persons carried and travel of the aircraft as restricted in the Grant of Exemption.

(4) The September 1963 contract with NASA required that appellee "furnish to the government for its exclusive use and control one each B-377 PG Aircraft, Serial No. N1024V".

(5) No movement of Aircraft B-377 PG, following its successful flight, was made except at the direction and for the use of NASA, excluding crew training or check flights (T. 58, lines 23-27).

The roundabout argument that appellee might have used the plane for other operations if minimum or maximum use of it was not made by the government is pure speculation aside from





implying that the appellee bound by a contract with the government might find it worthwhile to breach that contract which reserved to the government the exclusive use of the aircraft.

In the latter portion of its brief the government acknowledges that "exclusive use" by government is the touchstone of public aircraft and then attempts by analogy to The Bases Agreement and the Convention on International Civil Aviation to show Congress intended the term "civil aircraft" to apply to commercial operations of an aircraft. This, appellee feels, tends to avoid the basic question in this proceeding. For more than thirty-nine years Congress has been concerned and dealing with Federal aviation legislation beginning with the Air Commerce Act of 1926. The history of such legislation shows the development of air law and along with it a consistent and continuing treatment of civil and public aircraft by definition. Where is a better example of Congressional intention than in the legislation from time to time enacted on the very subject of this controversy? The Bases Agreement is special legislation for a particular subject peculiar to the signatory nations and limited in scope, and the Convention on International Civil Aviation falls in the same category. Federal aviation legislation is comprehensive, has developed over a period of many years, and is precisely pertinent at this point. Moreover, the Federal Aviation Act already defines public and civil aircraft, follows a long history of such definitions, and Congress should not now be second-guessed as to intention by words used under different facts and circumstances. It may also be observed that perhaps



Congress knew exactly what it was doing in providing for two categories of aircraft in the Federal Aviation Act, namely, civil and public, and for only the special classes of civil and state aircraft mentioned in The Bases Agreement.

### CONCLUSION

We accordingly submit the court below was correct in its determination that Aircraft B-377 PG was as a consequence of its use, the restrictions and limitations imposed upon its use, and the contractual obligation to provide the exclusive use to NASA, to be a public aircraft, squarely within the definition of that term in the Federal Aviation Act, and for such reasons respectfully suggest the determination of the trial court be affirmed.

Respectfully submitted,

JONES AND BEDNAR

By: PHILIP C. JONES

Attorneys for Appellee.



CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing is in full compliance with those rules.

/s/ Philip C. Jones  
PHILIP C. JONES





In the  
**United States Court of Appeals**  
For the Ninth Circuit

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**EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY**  
OF WISCONSIN, a corporation,  
*Appellant,*

v.

**PACIFIC INLAND NAVIGATION COMPANY, INC.,**  
a corporation, as successor to Inland  
Navigation Company,  
*Appellee.*

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**APPEAL FROM THE UNITED STATES DISTRICT COURT**  
**FOR THE WESTERN DISTRICT OF WASHINGTON**  
**SOUTHERN DIVISION**

**HONORABLE GEORGE H. BOLDT, Judge**

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**BRIEF OF APPELLEE**

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**FILED**

OCT 19 1965

FRANK H. SCHMID, CLERK  
CHARLES B. HOWARD  
RICHARD W. BUCHANAN  
*Attorneys for Appellee*

**SUMMERS, HOWARD & LE GROS**  
840 Central Building  
Seattle, Washington 98104



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COMPANY OF WISCONSIN, a corporation,  
*Appellant,*

v.

PACIFIC INLAND NAVIGATION COMPANY,  
INC., a corporation, as successor to Inland  
Navigation Company,  
*Appellee.*

No. 20273

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
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HONORABLE GEORGE H. BOLDT, *Judge*

---

**BRIEF OF APPELLEE**

---

I

**COUNTER-STATEMENT OF CASE BY APPELLEE**

This is a civil action brought by appellee to recover from appellant amounts which appellee has been obliged to expend to defend and to satisfy a judgment covering its liability to the Port of Pasco.

The background of this case may be found in decision of this Court on a prior appeal involving appellee's third party liability and the limitation of liability proceedings which it brought thereon. *Port of Pasco v.*

*Pacific Inland Navigation Company*, (CA 9, 1963) 324 F.2d 593, (Docket No. 18644 herein).

Damages to the Port of Pasco dock were caused by an explosion and fire originating on a barge of appellee's predecessor while unloading bulk gasoline at the Pasco dock. Appellant refused repeated tenders of the defense of action brought by the Port of Pasco against appellee for the dock damages and tender of the limitation of liability proceedings (Pretrial Order Admitted Fact 17, R. 33-34).

The liability of appellee to the Port of Pasco based upon the court judgment for \$55,464 was limited to the sum of \$3,692.16 under the Federal Limitation of Liability Act, 46 U.S.C. §183-185, after trial and appeal to this Court.

In this civil action appellee seeks recovery of the amount of its limited liability, plus total legal costs of the two prior actions and the appeal. Appellant has agreed that these litigation expenses in the sum of \$14,372.09 are reasonable in amount and were necessarily incurred by and on behalf of appellee (Pretrial Order Admitted Fact 19, R. 36). The total amount of the judgment as entered by the Court below is the sum of \$18,359.61, including interest on the above amounts (R. 76-77).

The basis of appellee's claim against appellant is a policy of liability insurance issued by appellant (Ex. A) and particularly the liability coverage on non-self-

propelled vessels (such as the barge involved in the explosion and Pasco dock fire) which was specifically provided for under Endorsement 23 on said policy.

The Court below first ruled in a preliminary way that there was no ambiguity in the insurance policy and hence no basis for allowing parol evidence to be admitted to show the intention and understanding of the parties as to coverage provided (R. 53). After the first stage of the trial the Court below rendered its Oral Decision finding that coverage was provided under Endorsement 23, when read together with the other provisions in appellant's policy (Tr. 55).

As a precaution, the Court below then went on to hold that if the appellate court disagreed with its interpretation of coverage provided by the policy, then an ambiguity existed, justifying reception of parol evidence (Tr. 55-56). At the request of appellant the trial was reopened to allow both parties to offer parol evidence. Thereafter, the Court again ruled in appellee's favor on construction of the policy terms, but found further on the basis of the parol evidence that it was the intention of the parties to provide coverage for third party liability risks of the type described above (Memorandum Decision at R. 58 and Findings of Fact 18 at R. 69). This appeal followed.

## II

### ARGUMENT IN SUPPORT OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

#### A. Preliminary Statement

This Court should not disturb the findings of fact by the District Court unless such findings are clearly erro-

neous. The burden of proving that such findings are clearly erroneous is upon appellant. Thus, in the *PACIFIC QUEEN*, (CA 9, 1962) 307 F.2d 700 this Court stated:

“\* \* \* it is not incumbent upon *appellees* to persuade this court that the District Court’s findings of fact are correct; on the contrary, the *appellants* must ‘persuade this court that the District Court’s findings of fact are, as specified by appellants, clearly erroneous’.”

*PACIFIC QUEEN*, 307 F.2d 700, 706.

This Court has established certain guidelines or rules to be applied in testing the adequacy and accuracy of District Court findings in civil cases:

1. Such findings will not be disturbed unless they are clearly erroneous, regardless of what decision this Court might reach if it had initially evaluated the same evidence. *Puget Sound Pulp and Timber Co. v. O'Reilly*, (CA 9, 1956) 239 F.2d 607, 609.
2. Due regard must be given to the opportunity of the District Court to judge the credibility of witnesses and the evidence. *Gypsum Carrier, Inc. v. Handelsman*, (CA 9, 1962) 307 F.2d 525, 529.
3. This Court must view the evidence in the light most favorable to the prevailing party. *Axelbank v. Rony*, (CA 9, 1960) 277 F.2d 314, 316.
4. Appellee, as the party prevailing below, must be given the benefit of all inferences that may be reason-

ably drawn from the evidence. *PACIFIC QUEEN*, (CA 9, 1962) 307 F.2d 700, 706.

**B. Record and Transcript References in Support of Findings of Fact**

Notwithstanding the above rules or guidelines, but in compliance with provisions of Rule 18 (3) of this Court, we enumerate herewith record references to specific evidence supporting the Findings of Fact which have been challenged by appellant in its Specifications of Error.

SPECIFICATION OF ERROR No. 1 relates to Findings of Fact 7 insofar as it found that the Port of Pasco dock was not "leased" to appellee's predecessor (R. 65).

The leases speak for themselves (Exs. C to F and see Stipulation as to Record on Appeal § 9 and following at R. 83-84). These leases covered certain specifically described areas consisting of the tank farm located across the road from the Port of Pasco dock which was involved in this fire. For this reason, Admitted Facts 6-9 in the Pretrial Order recite ownership of the dock by Port of Pasco and lease of tank farm facilities across the street from the dock by appellee's predecessors (R. 29-31).

Witness Light expressly testified that there was no lease on the dock (Tr. 43, 1.10 to 15) and described the *tank farm areas* which were leased from the Port of Pasco (Tr. 15, 1.9 to 18, 1.4). Witness Walls testified to the same effect (Tr. 88 l. 23 to 24).



The Manager of the Port of Pasco stated that the leases in effect with appellee's predecessor covered area "occupied by the tank farm only and does not include any area of the dock site" (Ex. K). The Port of Pasco provided fire protection, maintenance and fire insurance on its dock (Tr. 35, 1.19 to 36, 1.7) while appellee's predecessor provided similar services and insurance protection on the leased tank farm facilities as the leases expressly required (Ex. C, R. 83-84, Ex. K and Tr. 89).

SPECIFICATION OF ERROR NO. 2 again relates to Finding of Fact 7 where the Court below determined that the use of the Port of Pasco dock was a "non-exclusive use" (R. 65).

Admitted Fact 7 in the Pretrial Order states *inter alia*:

"The use of the Port of Pasco dock by plaintiff and its predecessor \* \* \* was a non-exclusive use \* \* \*." (R. 29-30)

The manager of the Port of Pasco stated that its dock facilities were used on a "non-exclusive basis" (Ex. K).

Additional support for this finding can be found throughout the testimony of witnesses Light and Walls (See particularly Tr. 36, 1.10 to 13 and 1.22 to 25, and Tr. 111, 1.2 to 11).

Furthermore, the explicit language of the leases (Exs. C to F) was to the effect that use of the dock by appellee's predecessor "shall not be exclusive to the company

(lessee)" (See § 9 and following in Stipulation as to Record on Appeal, R. 83-84).

SPECIFICATION OF ERROR NO. 3 relates to Finding of Fact 18 and the understanding and intention of the parties with regard to Exclusion (f) in appellant's basic printed Comprehensive Liability Policy (Ex. A) when considered as a part of the entire policy and its endorsements (R. 69).

Witness Walls, who was handling insurance matters for appellee's predecessor, testified that Endorsement 23 was insisted upon and eventually added to the policy to cover third party liability risks such as are involved in the Port of Pasco damage claim and suits (Tr. 87, 1.17 to 88, 1.4). He was never advised by appellant's representatives that the policy with its endorsements would not cover such risks (Tr. 91, 1.19 to 25). The broad scope of Endorsement 23 was not intended to be limited by printed Exclusion (f) in the basic policy (Tr. 115, 1.24 to 116, 1.8). Exclusion (f) was regarded by Walls as not affecting the specific coverage in unrestricted terms on loading and unloading of non-self-propelled water craft that was provided by Endorsement 23 when added to the policy (Tr. 118, 1.1 to 8, Tr. 108, 1.2 to 8, Tr. 120, 1.19 to 121, 1.10 and Tr. 126, 1.7 to 11).

Appellant's own underwriting representative, Mr. Frederickson, who testified at the trial, admitted that Endorsement 23 to the policy spoke in positive and

specific terms to provide coverage on risks of unloading water craft and that "the wording does not have any limitation built into the paragraph as such" (Tr. 158, 1.6 to 15).

Elsewhere in his testimony Frederickson stated:

"We did agree readily to provide liability insurance coverage for non-self-propelled vessels \* \* \*."  
(Tr. 155, 1.22 to 24)

Barge 535 as involved in the Port of Pasco dock fire was this type of vessel (Admitted Fact 4, R. 29). The fire damage to the dock and ensuing litigation involved the liability of appellee and its predecessor to a third party (Admitted Fact 17, R. 33-34). *Port of Pasco v. Pacific Inland Navigation Co.*, (CA 9, 1963) 324 F.2d 593.

### III

#### ARGUMENT IN SUPPORT OF CONCLUSIONS

The Court below concluded that Endorsement 23, when considered with all other parts of the policy, provided coverage for third party liability risks arising from the unloading operations on the barge at the Port of Pasco dock. It further determined that Exclusion (f) in the basic printed form of policy related to and excluded from coverage property which would be insurable by appellee under fire insurance policies. This would be in the nature of first party insurance coverage. As the Court below pointed out in its Decision, we are not concerned in this case with first party coverage, but with third party liability risks (R. 59). Hence, Endorse-

ment 23, which is specific and unlimited in its terms, provides liability coverage against risks of damage to property of third persons from enumerated causes, including unloading of gasoline from the non-self-propelled barge of appellee's predecessor.

#### **A. Provisions of an Insurance Policy Are Construed Most Strongly Against the Insurer**

This statement is hornbook law. It has been especially applied, however, on any attempt by an insurer to limit or restrict coverage. *St. Paul Mercury Insurance Co. v. Price*, (CA 5, 1964) 329 F.2d 687, 688.

The legal principle of strict construction of exclusionary clauses in insurance policies has been followed by the Washington Supreme Court which has stated that they are to be "very strictly construed" against the insurer. *Labberton v. General Casualty Co.*, (1958) 53 Wn.2d 180, 183; 332 P.2d 250, 252. In another case, the Washington Supreme Court has stated:

"It is familiar law that exclusionary clauses in insurance policies are construed most strongly against the insurer. If there is room for two constructions—one favorable to the insured and the other in favor of the insurer, the former will be adopted by the court."

*Brown v. Underwriters at Lloyd's*, (1958) 53 Wn. 2d 142, 152; 332 P.2d 228, 234.

One of the best known text authorities on insurance states:

"If the insurer intends to limit liability under an

indemnity policy, it must do so in unambiguous terms.”

13 *Appleman Insurance Law & Practice*, (1943)  
§ 7481, p. 200.

#### **B. Specific Provisions for Coverage Prevail Over Restrictive Language in a Policy**

In determining that there was coverage under an omnibus clause in an aircraft liability policy, notwithstanding apparent limitations on such coverage appearing in an exclusionary clause, the Court of Appeals for the Eighth Circuit has stated:

“Having affirmatively expressed the coverage in a broad promise to defend and to indemnify, it was incumbent on the company to define the exclusions from that promise in clear terms.”

*Insurance Co. of N. A. v. General Aviation Supply Co.*, (CA 8, 1960) 283 F.2d 590, 592.

We submit that appellant failed to expressly limit or restrict the specific coverage which it affirmatively undertook to provide by Endorsement 23.

#### **C. Written or Typed Parts of Policy Control Over Printed Language**

This Court has expressed the rule as to an insurance policy as follows:

“It is a well recognized principle of contracts that where a contract is partly written (or type-written) and partly printed the written (or type-written) parts control.”

*American Universal Insurance Co. v. Kruse*, (CA 9, 1962) 306 F.2d 661, 665.

In *Independence Indemnity Co. v. W. J. Jones &*



*Son*, (CA 9, 1933) 64 F.2d 312, a liability insurance policy had been issued to a stevedore contractor which contained an exemption or exclusion as to operation of vehicles in its basic printed form. A typewritten endorsement was added to the policy making the coverage applicable to "any work or operations \* \* \* carried on by the assured." After an accident involving one of the stevedore's jitneys, an injured third party brought suit against the insured stevedore. The insurer declined to defend claiming this particular risk was not covered and relying upon the limitations and exclusionary language in the basic policy. There, as here, the insured was forced to bring suit against the insurer to cover the amounts it had paid to satisfy judgment in the third party litigation, plus expenses and fees. The Court rejected the contentions of the insurer, stating *inter alia*:

"Thus the printed form of policy expressly contemplates liability for injuries resulting from the work carried on by chauffeurs if properly included by written additions to the policy, but it also contains a printed condition that injuries resulting from the use of the automobile driven by them should not be covered by the terms of the policy. \* \* \* In this situation *the familiar rule is that the typewritten portion of the policy controls the printed form.* \* \* \* This is particularly true where the written provision is contained in a rider which of itself would dominate in case of irreconcilable provisions. \* \* \* In the case at bar, the rider covering all other operations conducted by the workmen of the assured necessarily covers the operations of these 'jitneys,' whether classed as automobiles or not. There is thus a flat contradiction between



the two provisions of the policy which calls for an application of the rule giving *dominant effect to the typewritten provisions of the policy.*" (Emphasis added)

*Independence Indemnity Co. v. W. J. Jones & Son*, (CA 9, 1933) 64 F.2d 312, 315-316.

#### IV

### PAROL EVIDENCE AS ALTERNATIVE METHOD OF FINDING COVERAGE UNDER POLICY

#### A. General Statement

Appellee maintains its position, as advanced at time of trial, and which the Court below adopted. This is to the effect that Endorsement 23 on the policy (E. A) expressly provides coverage for risks of liability to third parties such as involved in the prior actions. *Port of Pasco v. Pacific Inland Navigation Co.*, *supra*. If this Court should construe the policy otherwise, then it is the position of appellee (as the Court below recognized and agreed) that there is sufficient legal basis for the introduction of parol evidence. Such evidence would be admissible to determine the intention and understanding of the parties to the contract.

This being a diversity case under 28 U.S.C. § 1332, the law of the State of Washington is applicable, since parol evidence is treated as a substantive matter. *RKO Radio Pictures v. Sheridan*, (CA 9, 1952) 195 F.2d 167, 170; *Jackson v. Domschot*, (1952) 40 Wn.2d 30; 239 P.2d 1058; 35 A *Corpus Juris Secundum*, Federal Civil Procedure § 458, p. 676.

In Washington it is well established that it is not necessary to find an ambiguity in a written contract before parol evidence is admissible. *McKennon v. Anderson*, (1956) 49 Wn.2d 55, 61; 298 P.2d 492. Evidence to show the surrounding circumstances may be admitted to explain, but not to vary or contradict, the terms of the contract and to place the court in the same position as the parties at the time of execution of the contract. *Vance v. Ingram*, (1943) 16 Wn.2d 399, 411; 133 P.2d 938, 944.

Of course, where there is in fact an ambiguity in an insurance contract, parol evidence is admissible to show the meaning of the questionable or conflicting language. *Kane v. Order of United Commercial Travellers*, (1940) 3 Wn.2d 355, 359; 100 P.2d 1036, 1038; *Miller v. Penn Mutual Life Insurance Co.*, (1937) 189 Wash. 269; 64 P.2d 1050.

Although the Court below in the present case made alternative Finding of Fact 18 and alternative Conclusion of Law 7 as to an ambiguity and the intention of the parties found from the parol evidence received (R. 69, 74-75), the above authorities indicate an additional ground under the substantive law on parol evidence in the State of Washington justifying the admission of parol evidence and the determination that the Court made thereon; namely, that it was the intention of both appellant and appellee to cover risks of liability for third parties for damage such as here involved by

addition of Endorsement 23 to the basic policy.

## V

### ANSWER TO APPELLANT'S ARGUMENTS

Much of what has been said heretofore applies to this section of the brief.

More specifically, appellee points out that Endorsement 10 of the policy (Ex. A) as referred to on pages 10, 12 and 20 of Appellant's Brief, was by its very terms limited to certain other specified property and hence not applicable to the Port of Pasco dock. Certain designated properties, either owned or specifically leased by appellee, were named in this endorsement. The fact that the Port of Pasco dock is not included among the properties named in Endorsement 10 rather clearly indicates that both appellee and appellant insurer treated it in an entirely different sense; namely, a property owned by a third party where appellee would be exposed to and should be protected against risks of liability for damage while using the facility.

Cases cited by appellee on the parol evidence question are not in point. *National Indemnity Co. v. Smith Gandy*, (1957) 50 Wn.2d 124; 309 P.2d 742, involves an attempt to incorporate into an insurance contract a telephone conversation and letter which were obviously not made a part of the contract. *Western Casualty Co. v. Harris Petroleum Co.*, (SD Cal., 1963) 220 F.Supp. 952, involved a similar attempt to admit by parol some previous insurance policies and letters. Both of these cases

deal with attempts to vary or change terms of the insurance policies, rather than to determine the intention of the parties and to explain uncertainties, as is true in the present case.

Reference to the Washington statute on insurance policies, R.C.W. 48.18.190 is likewise not pertinent here. The policy in this case includes the endorsements and particularly Endorsement 23. Appellee has not sought to incorporate any other writing into this insurance contract.

## VI

### CONCLUSION

We submit that the specific provisions of Endorsement 23 clearly indicate that this type of third party liability risk on fire damage, due to unloading of appellee's barge at the Port of Pasco dock, would be covered. In addition, a close reading of the entire basic policy and all endorsements calls for a similar conclusion as to coverage. Finally, and alternatively, any uncertainty as to interpretation of the policy terms has been explained by parol evidence which showed an intention of the parties to insure such risks.

For all of the above reasons the judgment should be affirmed.

Respectfully submitted,

CHARLES B. HOWARD

RICHARD W. BUCHANAN

*Attorneys for Appellee*

SUMMERS, HOWARD & LE GROS

840 Central Building

Seattle, Washington 98104

**CERTIFICATE**

I certify that, in connection with the preparation of the brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CHARLES B. HOWARD

*Attorney for Appellee*

No. 20273

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON,  
SOUTHERN DIVISION

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HONORABLE GEORGE H. BOLDT, *Judge*

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**REPLY BRIEF OF APPELLANT**

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ROBERT J. HALL of  
WALSH & MARGOLIS  
*Attorneys for Appellant*

Office and P.O. Address:  
406 Joseph Vance Building  
Seattle, Washington 98101





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IN THE  
**United States Court of Appeals**  
**For the Ninth Circuit**

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EMPLOYERS MUTUAL LIABILITY INSURANCE  
COMPANY OF WISCONSIN, a corporation,  
*Appellant,*

v.

PACIFIC INLAND NAVIGATION COMPANY, INC.,  
a corporation, as successor to  
Inland Navigation Company,  
*Appellee.*

No. 20273

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON,  
SOUTHERN DIVISION

---

HONORABLE GEORGE H. BOLDT, *Judge*

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**REPLY BRIEF OF APPELLANT**

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**I**

**REPLY TO APPELLEE'S COUNTER-STATEMENT  
OF THE CASE**

Appellant accepts the first two pages of appellee's counter-statement in their entirety (Answering Brief, pp. 1, 2). However, on page 3, appellee states that, following preliminary ruling, the trial was reopened at the request of appellant. Not so. The trial was reopened at the request of the court to receive appellee's offer of parol evidence in the event of review (Tr. 56).



**ANSWER TO APPELLEE'S ARGUMENT IN SUPPORT  
OF FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND JUDGMENT**

Appellant readily accepts appellee's general statements applicable to findings of fact, but questions the applicability of certain rules to the case at bar.

For example, it is correct that the evidence must be viewed in the light most favorable to the prevailing party (*Axelbank v. Rony*, CA 9, 1960, 277 F.2d 314, 316) and that findings "cannot be upset if they are supported by substantial evidence." *Pacific Queen*, (CA 9, 1962), 307 F.2d 700, 706.

But, *unlike Puget Sound Pulp and Timber Co. v. O'Reilly*, (CA 9, 1956), 239 F.2d 607, 609, (wherein the question arose as to whether a telephone conversation resulted in the modification of an agency agreement) and *Gypsum, Inc. v. Handlesman*, (CA 9, 1962), 307 F.2d 525, 529 (a seaman's libel for maintenance, cure and negligence under general maritime law and the Jones Act), here the evidence was undisputed, uncontroverted, unassailed. Accordingly, this court is not asked to weigh the evidence and substitute its judgment for that of the trial court. Rather, the court is asked to apply the applicable law to the undisputed evidence.

Specification of Error No. 1, pertaining to appellant's objections to Finding of Fact 7, is said (Answering Brief, p. 5) to be supported by the leases themselves (Ex. C to F and Stipulation as to Record on Appeal 9, R. 83-84).

Appellant disagrees. The dock (Ex. C, p. 2, ¶ 1(a); Ex. D, E, F) was just as much a topic and subject of the leases as was the so-called "tank-farm" and was an integral part of the leased premises, to wit: "a bulk petroleum terminal" (Ex. C, p. 1) and was so used (Tr. 17, ll. 20-22; Tr. 40, ll.1-15; Tr. 42, ll. 8-17; Tr. 43, l. 16-Tr. 44, l. 2; Tr. 124, l. 8-Tr. 125, l. 7). In short, if the dock was not "leased," neither was the "tank-farm." Both were a part of the bulk petroleum terminal and one used to complement the other, notwithstanding that the description of the premises contained in the lease does not include the dock. The consideration supporting the leases was not divided, or apportioned.

But whether the dock was or was not "leased" does not appear important unless "leased" means the same thing as "rented," because the latter is the language of Exclusion (f) (Ex. A).

Appellant claims that appellee's "use" and "occupancy" of the destroyed dock arose out of its "rental" of the dock under the long term leases and that the trial court should have so decided as a fact when requested so to do (R. 46, ¶ 6(a)).

Under "Specification of Error No. 2" pertaining to Finding of Fact 7, appellee claims that paragraph 7 of pre-trial order (R. 29-30) supports the finding. But appellee overlooks the qualifying and limiting clause contained in the pre-trial order:

"The use of the Port of Pasco dock by plaintiff and its predecessor or subsidiary companies prior

to and on December 15-16, 1958, was a non-exclusive use *in the sense that said dock could be used by companies or operators to (sic) the Inland Navigation Company and its subsidiaries when portions of the dock were not occupied by vessels and barges of Inland Navigation Company and its subsidiaries* . . .

Finding of Fact 7 is not so limited and there is absolutely no evidence that anyone other than appellee's predecessor had the right to use or was using the dock at the time of loss.

Moreover, appellee's officer (Light) testified that he did not have any knowledge that anyone other than appellee's predecessor ever used the dock (Tr. 45, l. 25; Tr. 46, l. 4) and Barge 535 was wholly occupying the dock at the time of loss (Tr. 46, ll. 5-7). Walls could remember occasions when sport-boaters used the dock (Tr. 111, l. 25-Tr. 112, l. 11), but nothing specific as to time.

In short, appellee apparently claims that, because others might have used and have been authorized to use the destroyed dock when it was not used by appellee's predecessor, the dock was not "used by the insured" at the time of the loss as defined in Exclusion (f), Exhibit A. This logic is, of course, fallacious, but here again, it should make no difference that appellee's use of the dock was "non-exclusive." If, as all of the evidence shows, appellee in fact "used" the dock at the time of loss, Exclusion (f) (2) should have applied to exclude coverage unless such exclusion was deleted, amended or otherwise superseded by some other endorsement. The

trial court should have so found as it was requested to do in the pre-trial order (R. 46, ¶ 6 (c)).

Concerning Specification of Error No. 3, appellee argues that Finding of Fact 18 is supported by the testimony of Mr. Walls (Tr. 67-135) offered by appellee in support of its offer of proof (R. 54, Tr. 4, l. 16-Tr. 7, l. 25) received over appellant's objection (Tr. 74, l. 21-Tr. 75, l. 2). Appellee also says that "Mr. Frederickson, who testified at the trial, admitted that Endorsement 23 to the policy spoke in positive and specific terms to provide coverage on risks of unloading water craft and that 'the wording does not have any limitation built into the paragraph as such'" (Tr. 158, ll. 6 to 15) (Br., pp. 7, 8). True, that Frederickson responded affirmatively to appellee's leading question and stated as quoted, but such is further subject to Mr. Frederickson's further explanation (Tr. 159, ll. 5-16) that coverages "A" and "C" extended by Endorsement 23 "are still subject to the exclusions that are found in the basic contract" and that "It is not necessary to refer to the exclusions again" in the endorsement.

Appellee argues that, since the fire damage to the dock resulted in liability of appellee's predecessor to a "third party" (Br. 8) and "Endorsement 23 was insisted upon and eventually added to the policy to cover third party liability risks" (Br. 7), therefore, appellant is liable to appellee.

(Parenthetically, it is significant to note that throughout its brief appellee speaks of "third party liability risks"

(Br., pp. 3, 7, 8, 15) and “risk of liability for third parties” (Br. 13), and carefully avoids mentioning the applicability of Exclusion (f) to the specific property destroyed.)

This argument assumes that the *liability* insurance contract covers *all* property owned by “third parties” whether such property is “occupied by or rented to the insured, or (2) . . . property used by the insured, or (3) . . . property in the care, custody or control of the insured or property as to which the insured for any purpose is exercising physical control . . .” (all excluded from coverage under Exclusion (f), Ex. A), and notwithstanding the fact that the insurance contract neither defines nor mentions “third party liability risks” nor “liability to a third party” nor even “third party.” The policy speaks in terms plain, clear and unambiguous, *excluding* from covered certain property *owned by* so-called “third parties” which is “occupied by, rented to, used by, under the care, custody and control of, the named insured and as to which the insured is exercising actual physical” even though the insured could be liable to the owner for the loss thereof.

In its Memorandum Decision and Order (Tr. 59) the trial court observed, “Exclusion (f) appears to have been intended to exempt from coverage of the policy property properly insurable under fire and extended coverage.” This conclusion is carried forward in Finding of Fact 16 (R. 68, ll. 9-11) and is one which is correct, as far as it goes. But the plain language of Exclusion (f) con-



templates excluding more than just property insurable under fire and extended coverage insurance. It contemplates property which may be insurable under *any other* form of insurance (Tr. 109, ll. 16-19) or which may not be insurable at all.

Appellee knows that it was exclusively “occupying, renting and using the dock at the time of loss and that the dock was under appellee’s care, custody and control and property as to which appellee was exercising actual physical control” at the time of loss, all as excluded from coverage under Exclusion (f), Exhibit A.

In order to *avoid* the exclusion appellee asserted a two-pronged approach:

1. Exclusion (f), Exhibit A, was superseded or deleted by implication by Endorsement 23, coverage under the latter being plain, clear and unambiguous (R. 41, ¶ 7) (Br. 8, 9).

But the trial court repeatedly rejected this contention (R. 53, Tr. 8; R. 58, Conclusion of Law 3; R. 73) and properly so in view of Mr. Wall’s testimony (Tr. 108, 115, l. 24-Tr. 116, l. 2; Tr. 117, ll. 10-25).

2. If Endorsement 23 did not specifically provide coverage for the dock, then the insurance contract was at least ambiguous and open to parol evidence in aid of construction (Tr. 4, ll. 1-3).

Appellee has yet to point out wherein the insurance contract as a whole (including Endorsement 23) is ambiguous, although the trial court thought it was (Tr. 56,



ll. 8-10) but later changed its mind (Conclusion of Law 3, R. 73).

Appellee merely suggests that Exclusion (f) be ignored and forgotten because, after all, Mr. Walls wanted to insure all property owned by "third parties," whether such property was otherwise excluded under Exclusion (f) or not. That Mr. Walls did not fully comprehend the provisions of Exclusion (f) is obvious from his testimony (Tr. 109, l. 10-Tr. 111, l. 11; Tr. 113, ll. 7-TR. 129).

Thus, notwithstanding Conclusion of Law 3 (R. 73), that the pertinent policy provisions are unambiguous, the court received and relied upon parol evidence (solely Mr. Wall's) to declare coverage and impose liability upon appellant.

Appellee suggests that the court was entitled to do so because provisions of an insurance policy are construed most strongly against the insurer (Br. 9). While that proposition may be "hornbook law" it is not the general law, nor is it the law of Washington which appellee admits is applicable.

In *St. Paul Mercury Insurance Co. v. Price*, (CA 5, 1964), 329 F.2d 687, 688, the circuit court recognized Texas law as applicable to the meaning of an accident policy exclusion relating to aircraft flights and refused to decide such interpretation until the state court had been afforded the opportunity to declare the applicable law. The court did, however, recite several rules applicable herein:

1. Words of limitation contained in a policy will be

strictly construed against the insurer.

2. The question whether ambiguity exists in the language of the contract is one of law.

3. If the language of the contract is clear and unambiguous such meaning must be given to the language as will carry out and effectuate the intentions of the parties, and in that event rules of construction are not to be applied.

4. If ambiguity exists in the contract, construction in accordance with applicable rules is in order.

Here, in view of the trial court's conclusion that the policy provisions are unambiguous, the second and third rules should be applicable, but as will be later seen, the first rule should not be applied.

In *Insurance Co. of N.A. v. General Aviation Supply Co.*, (CA 8, 1960), 283 F.2d 590, 592, the court, applying Missouri law, strictly construed an exclusion excepting from coverage "aviation sales or service or repair organizations" because the claimed insured was "not in sales, service or repair of aircraft, but sold aircraft supplies and equipment." Thus, the language of the exclusion was clear, but the claimed insured's activities were not as a factual matter within the language of the exclusion.

Contrary to appellee's assertion (Br., p. 9), the general rules as to the applicability of rules of construction is stated in 44 C.J.S. Insurance, §297, page 1190, *et seq.*, as follows:

"(2) Limitation of Rule.

“The rule of liberal construction in favor of the insured and strict construction against the insurer applies only where the language of the contract is ambiguous and susceptible of more than one interpretation, and is also subject to the further limitation that such language ordinarily cannot be construed otherwise than according to its plain and ordinary meaning.” (Cf. 29 Am. Jur. Insurance, §§259, 260.)

That this is the law of Washington is beyond doubt. *Jeffries v. General Casualty Co.*, 46 Wn.2d 543, 546, 283 P.2d 128 (1955); *Lawrence v. Northwest Casualty Co.*, 50 Wn.2d 282, 284, 311 P.2d 670 (1957); *Handley v. Oakley*, 10 Wn.2d 396, 408, 116 P.2d 833 (1941); *Howard v. Hollahan*, 182 Wash. 693, 48 P.2d 230; *Samarzich v. Aetna Life Insurance Co. of Hartford, Conn.*, 180 Wash. 379, 40 P.2d 129; *Miller v. Penn. Mutual Life Insurance Co.*, 189 Wash. 269, 64 P.2d 1050; *Kane v. Order of United Commercial Travelers*, 3 Wn.2d 355, 100 P.2d 1036 (1940). And, the language of *Hamilton Trucking Service v. Auto Insurance Company of Hartford, Conn.*, 39 Wn.2d 688, 237 P.2d 781, at page 692, would seem indeed appropriate in the case at bar:

“We have taken the position in such matters that a rule of construction should not be permitted to have the effect to make a plain agreement ambiguous and then construe it in favor of the insured. Our many cases on the subject of interpretation and construction of insurance contracts may be found in Volume 7 of the Washington Digest and Cumulative Annual, Insurance, Key No. 146. We see no occasion to engage in a review of, or to quote from them. The words of the part of the policy under consideration must be accorded their ordinary meaning.

The language used is plain and unambiguous. There is nothing to interpret or construe. We cannot avoid feeling as we read the cases cited by respondent that those courts have created ambiguities where none existed and have then used rules of construction to determine the intent of the parties and what they must have contemplated, thus enlarging the risk coverage of the insurance policies under consideration."

Here, since there is no ambiguity, there is nothing to construe, only to apply. Nevertheless, appellee seeks construction, and "strict" construction, particularly of Exclusion (f). At most appellee argues it was not "leasing" the dock and its use of the dock was "non-exclusive." Assuming the dock was not "rented to" appellee's predecessor at the time of loss it was certainly "occupied by" and "used by" it as those terms are ordinarily understood. Moreover, the dock was under the "care, custody and control" of appellee's predecessor as that clause has been applied in *S. Birch & Sons Construction Co. v. United Pacific Insurance Co.*, 52 Wn.2d 350, 324 P.2d 1073, and *Madden v. Vitamilk Dairy, Inc.*, 59 Wn.2d 237, 367 P.2d 127 (1961); and in accordance the general rule stated in *International Derrick & Equipment Co. v. Buxbaum*, (CA 3, 1957), 240 F.2d 536, 62 A.L.R.2d 1237 annotated; 62 A.L.R.2d 1245, II, §4; 29 Am. Jur. Insurance, §1350, page 466. Appellee does not and cannot challenge the well-settled Washington rule that "a word used in the insurance contract is to be construed in its ordinary signification." *Selective Logging Company v. General Casualty Company*, 49 Wn.2d 347, 301 P.2d 535 (1956), and cases cited at page 351. Also, *Viking Sprinkler Com-*

*pany v. Pacific Indemnity Company*, 19 Wn.2d 294, 296, 142 P.2d 394 (1943).

Appellee claiming "strict construction" of the Exclusion—(f)—cites *Labberton v. General Casualty Company*, 53 Wn.2d 180, 332 P.2d 228 (1958), and *Brown v. Underwriter's at Lloyds'*, 53 Wn.2d 142, 332 P.2d 228 (1958). While the rule is correct as a general proposition, the reason for the rule as stated in the *Labberton* case, i.e., that the exclusion was drafted by the insurer, completely fails, where, as here, the exclusion was drafted by the Glens Falls Insurance Company—appellee's prior carrier—and requested by appellee. If there was any hidden trap in it whereby appellee sought to delete Exclusion (f) *sub-silencio*, appellee should have said so. The reason for the rule of strict construction demands that in this case Endorsement 23 (Ex. A) be construed *against* the insured. See: 29 Am. Jur. Insurance, §259, page 643.

Under subheading B, appellee argues at page 10 of its brief, that typed parts control over printed parts of the policy. The rule is true, but is applied only where an ambiguity exists or there is some conflict between the typed and printed parts of the policy. Here, the court concluded that no such conflict existed.

The rule applicable is stated in Appleman, Insurance Law and Practice, Volume 13, §§ 7522 (p. 290) and 7537, as follows:

“§7522

“*In construing an insurance policy or certificate, all parts, both printed and written, should be given effect, if possible. In construing insurance contracts,*



the court must take the policy as it finds it, and where it is in printed form with written parts introduced into it, must take the whole together, both written and printed. *Wherever possible, the courts will harmonize such clauses if they can be reconciled by any reasonable construction, since it cannot be assumed that the parties intended to insert inconsistent provisions.*

“Of course, printed parts of a policy may be modified by written endorsement. And the general rule is that while written and printed portions of a policy will be reconciled, if possible, if they are definitely repugnant, the written clauses will be given effect over the printed. Accordingly, where written and printed portions of the policy are inconsistent, the written clauses prevail. The same preference is given to typewritten expression as to one in writing. . . .”  
(Emphasis added)

(Cf. 44 CJS Insurance, §300, p. 1206; 29 Am. Jur., Insurance, §255. See: *Holthe v. Iskowitz*, 31 Wn.2d 533, 197 P.2d 999 (1948), where rule applied and CJS text, §300, quoted.)

#### “§7537

“The insurance contract includes the printed form policy, declarations therein, and any endorsements thereto. Provisions of the policy and an endorsement thereon are to be read together. The plaintiff, in an action at law on an automobile policy, must recover, if at all, on the policy as written, including a part of the attached endorsement in fine print.

“In construing an endorsement to an insurance policy, the endorsement and policy must be read together, and the policy remains in full force and effect except as altered by the words of the endorsement. *Where the endorsement expressly provides that it is subject to all terms, limitations and conditions*



*of the policy, it does not abrogate or nullify any provision of the policy unless it is so stated in the endorsement.*

“As regards rules of construction, an insuring clause and an endorsement limiting protection, both being printed forms with filled in blank spaces, have been held of equal dignity. The policy and endorsement should be construed together unless they are so much in conflict that they cannot be reconciled.” (Emphasis added)

It is again noted that *all* endorsements on Exhibit “A” state; “*All other provisions and conditions remain unchanged.*” But, appellee would have this court read such language out of Endorsement 23, so as to gain the coverage thereof without the limitations of Exclusion (f). The trial court refused to adopt this suggestion, no doubt because it would require an insurer to repeat the major portion of every policy in every endorsement.

In support of this argument, appellee cites *American Universal Insurance Co. v. Kruse*, (CA 9, 1962), 306 F. 2d 661, 665, wherein under Montana law an *oral* contract of insurance was established. Such a contract is forbidden under Washington law. RCW 48.18.190 (claimed by appellee to be not pertinent (Br., p. 15)) requires all contracts of insurance to be in writing.

Appellee also cites and quotes from *Independence Indemnity Co. v. W. J. Jones & Son*, (CA 9, 1933), 64 F. 2d 312, 315-316, wherein the language of a typewritten rider was in conflict and inconsistent with the printed provisions. Of course, the court gave dominant effect to the typewritten provisions as stated in *Appleman, Insur-*

ance Law and Practice, Vol. 13, 5722, page 290, above quoted. But here the typewritten and printed portions of the contract are subject to harmonization and reconciliation without conflict and without inconsistency or ambiguity. The trial court so concluded (R. 73). At least appellee has not suggested wherein any policy provision is in conflict or inconsistent with any other provision.

### **ANSWER TO APPELLEE'S ARGUMENT CONCERNING PAROL EVIDENCE**

(Brief 12, 13)

Appellant objected to parol evidence (Tr. 74) for several reasons which were stated in "Defendant's preliminary memorandum on question of parol evidence" decided favorably to appellant in advance of trial (R. 53) and later rescinded at the commencement of trial (Tr. 3, 8, 56). These reasons are:

(1) The contract including endorsement is plain, clear and unambiguous and not open to construction;

(2) RCW 48.18.190 and Washington decisions interpreting same preclude it.

(3) The contract of insurance, Conditions 16 and 19, Ex. A, preclude it.

(4) The parol evidence rule which is the substantive law of Washington forbids it.

Contrary to appellee's assertion, it is necessary in Washington that the meaning ascribed to language of a contract be doubtful before parol evidence may be received

to implement the agreement. That is the holding of *McKennon v. Anderson*, 49 Wn.2d 55, 298 P.2d 492 (1956), wherein the court discussed the parol evidence rule at page 61 and interpreted the word "we," just as it had approved reception of evidence concerning the words "now manufactured" and "subject to fires" as used in the contract involved in *Leavenworth State Bank v. Cashmere Apple Co.*, 118 Wash. 356, 204 Pac. 5.

And while it is a rule of construction that "surrounding circumstances leading up to the execution of an agreement" are admissible, "not to evidence an intent contrary to that expressed in the agreement, but to place the court in the same position as the parties," *Vance v. Ingram*, 16 Wn.2d 399, 411, 133 P.2d 938 (1943), such rule has never permitted testimony of negotiations leading up to the execution of a written contract under the guise of placing the court in the same position as the parties for the purpose of judicial construction. Here, Mr. Walls' testimony was permitted to go far beyond the range of surrounding circumstances and squarely into his tacit understandings, intentions and interpretations and conversations pertaining to the contracts, as best he could recall after more than six years. This must be illustrative of the reasons why Washington requires all contracts of insurance to be in writing. RCW 48.18.190 so provides and the Washington decisions interpreting same forbid reception of such evidence. In *National Indemnity Co. v. Smith-Gandy, Inc.*, 50 Wn.2d 124, 309 P.2d 742 (1957), the insured called the insurer at 3:15 p.m. on June 7, 1955, to place coverage on a truck in

transit. Unknown to either party, the truck had been involved in an accident one hour earlier. Insured requested retroactive coverage and insurer agreed only to cover from the time of call, 3:15 p.m. The insured confirmed coverage to start at 3:15 p.m., June 7, 1955, by letter. The policy was later issued showing commencement of coverage at 12:01 a.m., June 7. The insurer sought to introduce insured's letter of confirmation of coverage to which insured objected. Citing RCW 48.18.190, the Supreme Court held the letter of confirmation inadmissible.

In *Western Casualty & Surety Co. v. Harris Petroleum Co.*, U.S.D.C. SD Calif., Central Div. (1963), 220 F. Supp. 952, the question arose as to whether an automobile owned by Harris Petroleum and involved in a fatal accident was within liability insurance policy covering "all owned automobiles." The specific vehicle was not listed in the policy and correspondence indicated that neither the insurer nor the insured intended it to be covered because of the insured's desire to reduce its premium payment. The court held the vehicle to be covered, applying Washington law, distinguishing certain Washington cases and deciding that *National Indemnity Co. v. Smith-Gandy, Inc.*, *supra*, controlled so as to preclude the admissibility of previous policies and correspondence between the insured and insurer.

Appellee says these cases "deal with attempts to vary or change terms of the insurance policies, rather than to determine the intention of the parties and to explain uncertainties." It is clear that Mr. Walls misinterpreted Exclusion (f), Ex. A, as precluding coverage only for

“owned” property rather than property also occupied by, rented to, used by and under the care, custody and control of appellee’s predecessor.

It may be conceded that Mr. Walls attempted to explain the word “used” (Tr. 111, ll. 2-5), but how often does one operate a barge across a bridge? His interpretation in this regard is inconsistent with that most favorable to the insured as stated in *Smith v. Northern Pacific Ry. Co.*, 7 Wn.2d 652, 110 P.2d 851, 854, quoted in appellant’s opening brief at page 16.

Mr. Walls’ testimony concerning conversations with the broker, Fleming, and later Frederickson and Hackbarth, leading up to the issuance of the insurance contract were something more than an explanation of surrounding circumstances and to explain undisclosed uncertainties. They were negotiations and conversations prior to the issuance of Endorsement 23 and merged therein. It is just this type of thing that the parol evidence rule, the Washington statute and decisions interpreting same, and Conditions 16 and 19 of the insurance contract (Ex. A; quoted at pp. 18, 19 of appellant’s opening brief) are intended to prevent.

For these reasons, the court should have sustained appellant’s objection to appellee’s offer of proof, particularly paragraphs 2 through 7 (Tr. 5, ll. 2-7, l. 19) instead of reserving ruling thereon (Tr. 8, ll. 1-4) and subsequently considering the testimony offered in support thereof.



## CONCLUSION

Endorsement 23 and Exclusion (f) having been determined by the court to be plain, clear and unambiguous, and the former not affecting the latter, both should have been applied in harmony to the entire loss. So applied Endorsement 23 covered the claims of approximately \$7,000.00 of other parties, including a claim by Tidewater-Shaver Barge Lines, Inc., for damage to the structure of the Barge *Onandaga* (R. 33, ll. 13-16) paid by appellant because such *property* was not excepted under Exclusion (f). But because the destroyed dock which was the subject of the Port of Pasco claim, was "occupied by, rented by or used by" appellee's predecessor or under its "care, custody and control," and property as to which it "exercised actual physical control," the claim for destruction of such *property* was excepted; payment therefore being properly refused by appellant.

Since the pertinent policy provisions are plain, clear and unambiguous, the court erred in receiving parol evidence over appellant's objection because

(1) the parol evidence rules bar it;

(2) RCW 48.18.190 and the Washington decisions thereunder forbid it; and

(3) Conditions 16 and 19 of the insurance contract forbid it.

Even if it be assumed that parol evidence was admissible, such does not support the challenged findings of fact, conclusions of law and judgment.



When the question is considered whether or not the particular property destroyed is covered under Endorsement 23 and Exclusion (f), applied in harmony, the answer can only be negative. In the *absence* of Exclusion (f) — as appellee suggests — the specific property would be covered. But it is extremely difficult to arrive at the proper conclusion while using terms as vague and nebulous as “third party liability risks” which are entirely foreign to the contract involved and can only result in confusion.

To illustrate, if appellee was occupying, renting or habitually using a building and ran into it with an automobile, appellee would claim coverage under the policy for its liability to the owner, notwithstanding the clear exception in Exclusion (f).

Likewise, if appellee borrowed an automobile, collided, and was liable to the owner for damage, appellee would claim coverage under this policy, rather than the collision coverage of the owner.

In short, appellee seeks full property insurance as well as liability insurance under the one contract for the latter and payment of the single premium therefor. In order to do so appellee must read out of the contract Exclusion (f) either in its entirety, as suggested, or at least partially, by construction, so that Exclusion (f) would read:

“This policy does not apply: . . .

“(f) under Coverage C, to injury to or destruction of (1) property owned . . . by . . . the insured . . . (2) . . . (3) . . . (4) . . .”

Such interpretation under the guise of construction amounts to nothing more than a judicial re-writing of the contract. Rather, this court should apply the policy as a whole to the property destroyed thereby giving effect to each and every clause of the contract and the intentions of both parties evidenced thereby. Such application requires that the judgment be reversed in favor of appellant and that this case be dismissed because appellee's admissions concerning the character, nature and extent of its use and occupancy of the destroyed property (R. 37, l. 1; R. 38, l. 25; Tr. 65, l. 1-Tr. 67, l. 4; R. 62, ll. 15-17) clearly preclude coverage under Exclusion (f), Ex. A, as written.

Respectfully submitted,

ROBERT J. HALL of  
WALSH & MARGOLIS  
*Attorneys for Appellant*

### CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with these rules.

ROBERT J. HALL  
*Attorney for Appellant*



No. 20273

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IN THE  
**United States Court of Appeals  
For the Ninth Circuit**

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EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY  
OF WISCONSIN, a corporation,  
*Appellant,*

v.

PACIFIC INLAND NAVIGATION COMPANY, INC.,  
a corporation, as successor to  
Inland Navigation Company,  
*Appellee.*

---

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON,  
SOUTHERN DIVISION

---

HONORABLE GEORGE H. BOLDT, *Judge*

---

**BRIEF OF APPELLANT**

---

ROBERT J. HALL of  
WALSH & MARGOLIS  
*Attorneys for Appellant*

Office and P.O. Address:  
406 Joseph Vance Building  
Seattle, Washington 98101



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COMPANY OF WISCONSIN, a corporation,  
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HONORABLE GEORGE H. BOLDT, *Judge*

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**BRIEF OF APPELLANT**

---

**STATEMENT AS TO JURISDICTION**

Appellee and appellant are residents of different states and the amount in controversy in the District Court and in this Court exceeds \$10,000. Accordingly, the District Court had and acquired jurisdiction pursuant to Title 28 U. S. Code § 1332 (Tr. 27, 62, 63, 73).

From the Judgment (Tr. 76, 77) entered on May 24, 1965, appellant timely filed in this Court its Notice of Appeal (Tr. 78) and Supersedeas and Cost Bond (Tr. 79, 80) on June 23, 1965, in accordance with Rule 75, Rules of Civil Procedure.

## STATEMENT OF THE CASE

Appellee, as successor of Inland Navigation Company, brought this action to recover \$3,692.16 paid to the Port of Pasco for damage to its dock arising out of an explosion and fire occurring December 16, 1958, aboard appellee's gasoline-carrying Barge 535, Port of Longview, and previously litigated in this Court in Cause No. 18644 decided October 28, 1963 (Tr. 5). In addition, appellee sought to recover its litigation expenses (\$14,372.09) incurred in defending against the Port of Pasco's claim (Tr. 6, 7). Appellee's right of recovery was predicated on a contract of insurance issued by appellant to appellee's predecessor, Inland Navigation Company, the pertinent portions of which (Tr. 23-29) were incorporated by reference in the Complaint (Tr. 2).

Appellant admitted the issuance of the policy, the damage to the dock and the amount thereof, and appellant's refusal to defend appellee and pay the Port of Pasco's claim (Tr. 24). As an affirmative defense appellant alleged that the dock involved was occupied and used by appellee pursuant to a long-term lease with the Port of Pasco and that at the time of explosion of Barge 535, appellee was exclusively using, occupying and controlling the dock involved and that the policy of insurance excludes coverage for injury to such property (Tr. 25; See Ex. "A," Exclusion (f), Tr. 10).

The facts are hardly in dispute. Most facts were agreed or admitted and incorporated in the Pre-Trial Order (Tr. 27 through 40) and subsequently set out *verbatim* as find-

ing of fact (Tr. 63 through 73) or incorporated by reference therein (Tr. 62). Briefly, these are as follows:

Appellee and its predecessor, Inland Navigation Company, have for many years operated certain petroleum storage facilities at Pasco, Washington under various leases from the Port of Pasco (Exhibit C, D, E, F; Tr. 83).

The Port of Pasco owns certain dock facilities diagramed on Exhibit "B" which appellee and others have the right to use.

A portion of the dock facilities is used for general cargo or grain. Another portion is used by appellee for the purpose of transferring petroleum from water carriers to land or vice versa (St. 42, 48; Tr. 38). The latter, called the "oil-dock," is diagramed on Exhibit "G," and is the only portion of the dock involved in the Port of Pasco's claim (Tr. 37); ¶ No. 20; St. 39). This so-called "oil dock" was used by plaintiff's predecessor during all of 1958 for the purpose of transferring petroleum products, and such dock was actually used as a part of the operation of the tank farm as an interchange facility (St. 41, 42).

In fact, the dock had been used by appellee for the purpose of transferring petroleum products from or to vessels approximately two hundred twenty-five (225) times during 1958 (St. 66), and Barge 535 had been moored at the precise location about 30 times in 1958 according to appellee's estimates (St. 66). Of course, Mr. Paul Light, General Manager of appellee's predecessor in December 1958 (at the time of trial, assistant to the president handling traffic matters), lacked knowledge that any other



people—other than appellee's predecessors—were using or had used the "oil dock" at the time of loss in December 1958 (St. 46), although John Walls—who had worked under Mr. Light (St. 70)—remembered one occasion when pleasure boats delayed appellee's access to the dock (St. 112).

On the afternoon of December 15, 1958, Barge 535 and Barge 536 had arrived at the Port of Pasco dock facilities under tow of the tug "Keith". Barge 536 had discharged or transferred its cargo through the hose pump and pipeline on the "oil dock" to the tank farm from about 3:30 to 8:00 p.m., at which time it was moved from its position beside the "oil dock" up-river, in order to moor Barge 535 alongside the "oil dock" for the purpose of discharging or transferring its cargo through the hose, pump and pipeline mentioned (Tr. 37). These were the only means provided at the time of explosion by which petroleum products could be transferred or discharged from appellee's vessels to tank farm, or vice versa (Tr. 38; St. 41, 42).

At the time of the explosion, Barge 535 was starboard side to the "oil dock" designated on Exhibit "G" with the forward section breasting the face of the dock and the stern fast to a dolphin, which was about forty (40) feet down-river from the "oil dock" as indicated on Exhibit "G" (Tr. 37). The barge "Onandaga" owned and/or operated by Tidewater-Shaver Barge Lines, Inc., was moored approximately 200 feet up-river (west) of Barge 535 alongside the general cargo or "grain" area of the dock (Tr. 30, 38). The Tug "Keith" and Barge 536 were

moored approximately 600 and 500 feet, respectively, up-river, alongside the dock (Tr. 30).

From the time of arrival of Barge 535, the "oil dock" was used by appellee for the purposes of access of persons to and from the barge. No person other than employees of appellee are known to have crossed over and upon the dock the evening of December 15, 1958, prior to the explosion of Barge 535 (Tr. 38; St. 42).

While so moored and in the course of discharging its gasoline cargo on the evening of December 15, 1958, Barge 535 exploded, caught fire, and sank (Tr. 31). The fire spread to the dock of the Port of Pasco, extensively damaging it (Tr. 31). Only that portion of the dock facility approximately 123 feet in length and 50 feet in width, designated on Exhibit "G" as "oil dock" was involved in the Port of Pasco's claim against appellee (Tr. 37). The general cargo or grain-dock facilities were not damaged, although the Tidewater-Shaver barge "Onandaga" was damaged and a claim for such presented to and paid by appellant (Tr. 33).

Appellant refused to honor the claim for damage to the "oil dock", and after appellee's liability had been established and discharged (Tr. 33), it brought this action on the insurance contract for reimbursement of the amount paid to the Port of Pasco and its litigation expenses reasonably incurred in defending against the Port's claim. The amounts claimed by appellees were admitted by appellant and were never involved as issues.

The only question involved was whether or not under the contract of insurance (Exhibit "A"), Coverage "C" (Tr. 9) would apply to the loss of the Port of Pasco's dock.

The issues of fact and law were framed in the Pre-trial Order (Tr. 45-48) and appellee's and appellant's contention therein set out in detail (Tr. 40-44). In short, appellee claimed specific coverage under Endorsement 23 (Tr. 23), contending that such endorsement clearly superseded Exclusion (f) of the printed policy form (Tr. 10). On the other hand, appellant claimed that Exclusion (f) and Endorsement 23 were not inconsistent and should be harmoniously applied to the facts and that the undisputed facts established that Exclusion (f) applied to prohibit coverage of the dock.

Following submission of written memorandum and in advance of trial, the District Court ruled (Tr. 53) that Endorsements 3 and 23 pertained solely to Exclusion (b) of the printed policy and it was not intended or contemplated that either would in any way affect Exclusion (f). Finding no ambiguity on the face of the policy, the Court ruled that parol evidence would not be admissible to vary the terms of the contract.

At the time of trial March 3, 1965, appellee submitted an offer of proof (Tr. 54-57) pertaining to negotiations concerning the insurance contract. The Court reserved ruling on the admissibility thereof until hearing a portion of the testimony (St. 55) at which time the Court adhered to its prior decision that Endorsements 3 and 23 pertained solely to Exclusion (b) and not to Exclusion (f) (Tr. 54).

Thereupon the Court determined that coverage existed under Endorsement 23 when read in the light of other policy provisions and in any event there existed an ambiguity which should be resolved in appellee's favor (St. 55). The Court then continued the matter for the reception of evidence indicated in plaintiff's offer of proof (St. 56, 57).

Upon recommencement of proceedings March 26, 1965, the Court allowed appellant a continuing objection to all evidence of a parol nature (St. 74). Thereafter, having received all such evidence, the Court on April 29, 1965, rendered its Memorandum Decision and Order (Tr. 58-60). On May 24, 1965, after partial rejection of appellant's proposed findings of fact (Tr. 84), the Court made and entered Findings of Fact, Conclusions of Law and the Judgment from which this appeal is taken.

### **SPECIFICATIONS OF ERROR**

1. The District Court erred in making and entering Finding of Fact 7 insofar as it found that the dock involved herein was not "leased" by appellee's predecessor (Tr. 65, l. 2), for the reason that such finding is contrary to the undisputed evidence (Exhibits C, D, E, F).

2. The District Court erred in making and entering Finding of Fact 7, (Tr. 65, l. 19-20) that "the use of the Port of Pasco dock by plaintiff on December 15, 1958, was a non-exclusive use," because the undisputed and admitted facts in evidence are that the appellee and its employees were the *only* persons using the dock on the date indicated

—and known to have used the dock during the entire calendar year 1958.

3. The Court erred in making and entering Finding of Fact 18 (Tr. 69) which provides: “Because of the limited nature and extent of the use of the Port of Pasco dock by plaintiff’s predecessor, the language of Exclusion (f) of defendant’s policy (Exhibit “A”), when considered as part of the entire policy with its endorsements, and in the circumstances shown by the evidence in this case, was not understood or intended by the parties to exclude coverage for third-party claims as asserted against plaintiff’s predecessor by the Port of Pasco for loss and damage to its dock in the fire and explosion aboard Barge 535 on December 15-16, 1958”, for the reason that such finding is without evidentiary support or based upon testimony erroneously received in evidence over appellant’s objection on parol evidence grounds.

4. The District Court erred in making and entering Conclusion of Law 4 (Tr. 74) as follows:

“Because of the limited nature and extent of right to and use of the Port of Pasco dock by the insured, Exclusion (f), when considered as part of the entire policy with its endorsements, was not understood or intended to exclude coverage for claim asserted against the insured by the Port of Pasco for loss and damage to the dock” for the reasons specified immediately above concerning Finding of Fact 18.

5. The District Court erred in making and entering Finding of Fact 22 and Conclusion of Law 6, insofar as the



Court found and concluded that appellee is entitled to judgment herein for the reason that such is contrary to the undisputed facts and law applicable thereto.

6. The Court erred in making and entering Conclusion of Law 7 as follows:

“If on appeal it be found that there was an ambiguity in the insurance policy (Exhibit “A”), the parol evidence presented by the parties, subject to the Court’s ruling on its admissibility, does not show that the parties to the insurance contract intended to exclude coverage for the third-party claim in question asserted by the Port of Pasco,” for the reason that such conclusion is either without evidentiary support or inferred from evidence received in violation of the parol evidence rule, the pertinent Washington statute RCW 48.18.190, the decisional law interpreting same, and the insurance contract (Tr. 14, ¶ 16).

7. The District Court erred in making and entering judgement in favor of the appellee for the reason that such judgement is not supported by the evidence and law applicable and is in conflict therewith.

8. The District Court erred in failing to find and conclude that appellee’s actual admitted, exclusive use, occupancy, rental, and control of the dock destroyed—at the time of its loss—clearly establish the dock as property excluded from coverage under Exclusion (f) of the applicable insurance contract (Tr. 10) because:

a. At the time of loss the property involved was, as a matter of fact:



- (1) rented by appellee, or
- (2) occupied by appellee, or
- (3) used by appellee, or
- (4) under appellee's care, custody and control, or
- (5) under appellee's physical control; and

b. Such use, occupancy, rental, and control of the destroyed dock at the time of loss establish such dock as property within Exclusion (f) of Exhibit "A" (Tr. 18) therefore precluding coverage to appellee as a matter of law.

### SUMMARY OF ARGUMENT

Appellant's specifications of error present three principal propositions which shall be argued in the following order:

1. The insurance contract (Ex. "A") including Endorsements 3, 10 and 23 and all other pertinent (Tr. 9-23) is plain, clear, unambiguous, devoid of uncertainty and should be, according to its terms applied to the undisputed facts relating to appellee's rental, use, occupancy, care, custody and control of the property damaged (oil dock) thereby precluding coverage.

2. Parol evidence is inadmissible to add to, detract from, modify or contradict the insurance contract herein.

3. Assuming that parol evidence was properly admitted, such does not support a Judgment against appellant, and the evidence as a whole is insufficient as a matter of law to support the Judgment entered.

## ARGUMENT

1. The insurance contract and its endorsements are not conflicting, are plain and unambiguous, and should be applied according to their plain terms. The pertinent policy provisions are as follows:

### COVERAGE C

#### Property Damage Liability Other Than Automobile

To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law or by written contract for damages, because of injury to or destruction of property, including the loss of use thereof, caused by accident.

### EXCLUSION (b)

This policy does not apply: . . . under Coverages A and C, except with respect to operations performed by independent contractors and except with respect to liability assumed by the insured under a contract covered by this policy, to the ownership, maintenance, operation, use, loading or unloading of (1) watercraft if the accident occurs away from the premises owned by, rented to or controlled by the named insured, except insofar as this part of this exclusion is stated in the declarations to be inapplicable, or (2) aircraft;

### ENDORSEMENT 3

#### Watercraft

It is agreed that such insurance as is afforded by the policy for bodily injury and property damage liability applies with respect to the watercraft described below, while away from the premises owned, rented or controlled by the named insured, provided, that the insurance does not apply to any watercraft while rented to others or while used for carrying passengers for a consideration.

Non-Self-Propelled vessels owned by the named insured.

## ENDORSEMENT 23

## Canceling Previous Endorsement

It is agreed that Endorsement Number 3 is hereby cancelled.

"It is agreed that coverages "A" and "C" of this policy shall specifically apply to the ownership, maintenance, operations, use, loading or unloading of watercraft; provided, however, that such coverage shall apply only to non-self-propelled vessels and self-propelled vessels under 25 feet in length."

## EXCLUSION (f)

This policy does not apply: . . .

(f) under Coverage C, to injury to or destruction of (1) property owned or occupied by or rented to the insured, or (2) except with respect to liability under sidetrack agreements covered by this policy, property used by the insured, or (3) except with respect to liability under such sidetrack agreements or the use of elevators or escalators at premises owned by, rented to, or controlled by the named insured, property in the care, custody or control of the insured or property as to which the insured for any purpose is exercising physical control, or (4) any goods, products or containers thereof manufactured, sold, handled, or distributed or premises alienated by the named insured, or work completed by or for the named insured, out of which the accident arises.

Endorsement 10 (Tr. 21, 22, Exhibit "A") which modified Exclusion (f)(1) is not applicable for the reason that appellee did not maintain in effect fire and extended coverage on the dock as required therein (Tr. 38, ¶ 31).

It is clear as the Court repeatedly held, Endorsement 3 and its substitute Endorsement 23 pertain only to Exclusion (b) and not to Exclusion (f), and neither En-

dorsement 3 nor 23 was designed to eliminate or otherwise affect the exclusion (Tr. 53, St. 54, Tr. 58, Conclusion of Law No. 3, Tr. 72). That conclusion is supported by the testimony of appellee's only witness concerning it, Mr. Walls (St. 108, 109, 118, 126).

Exclusion (b), Endorsement 3 and substitute Endorsement 23 all pertain to various watercraft *activities* of appellee at different places. They do not purport to refer to specific *property* not covered, nor do they refer to Exclusion (f).

Under these circumstances the applicable rule of law is stated in Appleman, Insurance Law and Practice, Vol. 13, §§ 7522 and 7537, in part as follows:

Section 7522:

"In construing an insurance policy or certificate, all parts, both printed and written, should be given effect if possible . . . Wherever possible, the courts will harmonize such clauses if they can be reconciled by any reasonable construction since it cannot be assumed that the parties intended to insert inconsistent provisions . . ." (Cf. 44 CJS Insurance, § 300, p. 1206; 29 Am. Jur. Insurance, § 255.)

Section 7537:

"In construing an endorsement to an insurance policy, the endorsement and policy must be read together and the policy remain in full force and effect except as altered by words of the endorsement. *Where the endorsement expressly provides that it is subject to all terms, limitations and conditions of the policy, it does not abrogate or nullify any provision of the policy unless it is so stated in the endorsement.*" (Emphasis supplied)

Here, every endorsement provides “[a]ll other provisions and conditions remain unchanged.” It must be remembered that it was appellee—not the appellant-insurer—who demanded the language of Endorsement 23 as it appeared in its previous policy (Exhibit “I”; transmitted per Item 8, Exhibit “I,” and Item 8, Exhibit “J”; St. 81, 99). Accordingly, if such endorsement created any ambiguity in the policy, it should be interpreted against appellee (29 Am. Jur. Insurance § 259). But neither the appellee nor the appellant were confused into believing that Exclusion (f) was inoperative or modified by Endorsement 23. Mr. Walls, appellee’s expert, so testified (St. 116, 117).

Since Endorsement 23 and Exclusion (f) may be construed in harmony, with equal dignity, the only question to be resolved is whether or not the damaged property (dock) was that of the kind excluded under Exclusion (f). The explosion and fire which destroyed the dock occurred while the dock was being occupied and used by appellee for the specific purpose for which it was designed, constructed and maintained. If any effect whatsoever is to be given to Exclusion (f) it is clear that appellee cannot prevail.

Appellant submits that the “oil dock” involved was excluded from liability coverage for at least the reasons stated in Exclusions (f) (1) and (2) and, perhaps, also for the reasons stated in Exclusion (f) (3).

The basic rule involved is stated in 29 Am. Jur. Insurance, § 252, as follows:

*“Meaning of Words and Phrases*—Contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous their terms are to be taken and understood in their plain, ordinary, and popular sense, unless such terms have acquired a different and technical sense in commercial usage or unless it clearly appears from the context that it was the intention of the parties to use such terms in a technical or peculiar sense . . .”

*Town of Tieton v. General Ins. Co. of America*, 61 Wn.2d 716, 721, 380 P.2d 127 (1963), and cases cited therein; *Anderson v. Lumbermen’s Co.*, 53 Wn.2d 404, 407, 333 P.2d 938 (1959); *Lesamiz v. Lawyer’s Title Ins. Co.*, 51 Wn.2d 835, 838, 322 P.2d 351 (1958); *Lawrence v. Northwest Cas. Co.*, 50 Wn.2d 282, 285, 311 P.2d 670 (1957).

It is submitted that the words “occupied,” “rented” and “used” should be taken in their plain, popular, ordinary and customary meaning and that such words have not acquired any technical, special or different meaning in commercial usage. Appellee has not suggested otherwise.

1. Property . . . *occupied* by appellee:

How can appellee seriously assert that it was not occupying the dock for the purpose for which constructed?

2. Property . . . *rented* to appellee:

The use of the dock was included as a subject of several leases (Exhibit “C,” Stipulation Tr. 83). There is



no evidence that anyone else leased, rented or occupied the dock, and the mere fact that others might sometime likewise be permitted to use the dock does not negate appellee's rental thereof.

3. Property . . . *used* by appellee:

The word "used" in a farm liability policy excluding property "used" by the insured implies customary practice, continuity, or a certain duration of time. *Connecticut Fire Insurance Company v. Reliance Insurance Company of Madison*, Wash. D. C. Kan. 208 F. Supp. 20, 25; Cf. *Murphy v. Trazmor*, 110 Colo. 446, 135 P.2d 230, 232, 145 ALR 1059.

As stated by the Washington Supreme Court in *Smith v. Northern Pacific Ry. Co.*, 7 Wn.2d 652, 110 P.2d 851, 854:

"The verb 'use' or 'used' means to employ or be employed or occupied, in which sense it includes a single isolated instance of use, and also to practice customarily or, in the case of a place or thing, to be the subject of customary practice, employment or occupation."

How can appellee seriously contend that it was not the customary user of the dock when its barges tied up there 225 times (Barge 535, 30 times) during 1958 to transfer petroleum and the dock was destroyed while being used by appellee for the purpose for which it was constructed.

4. Property . . . in the care, custody or control of the insured.

At the time of the loss appellee had both proprietary and possessory control of the dock. *International Derrick and Equipment Co. v. Buxbaum*, CA 3, 240 F.2d 536, 62 A.L.R. 1237 (1957); also *S. Birch & Sons Const. Co. v. United Pacific Insurance Co.*, 52 Wn.2d 350, 324 P.2d 1073.

If the dock was not in appellee's care, custody and control, and property as to which it was exercising physical control, it is hard to imagine who was in and exercising such control.

Appellee has affirmatively shown that the property damaged (oil dock) fits squarely within one or more of the various provisions of Exclusion (f) (Tr. 37, 38). It cannot now say that it was not using the dock simply because others might have used it at some other time. The adjective "non-exclusive" modifying "use" is nowhere to be found in Exclusion (f) and the court erred in finding and concluding that, because appellee's use was non-exclusive (at other times), Exclusion (f) did not apply. Appellee was involved in this loss only because it was using and occupying the dock leased by it from the port, exercising care, custody and control and actual physical control, in accordance with its business practices of long standing.

If, as Mr. Walls states, Endorsement 23 and Exclusion (f) were separate and distinct, and the one did not affect the other, the Court erred in receiving parol evidence as an aid in interpreting the contract, because there was nothing to interpret and the policy should be applied

to the facts according to its terms. 29 Am. Jur. Insurance, § 246; 44 CJS Insurance, § 297 b; *Collins v. Northwest Casualty Co.*, 180 Wash. 347, 355, 39 P.2d 986, 97 A.L.R. 1235.

## 2. Parol evidence should not have been admitted

Because the contract was clear and unambiguous, the Court erred in receiving parol evidence concerning the negotiations which preceded and surrounded its execution and the issuance of subsequent endorsements; it is to prevent this very thing that Washington had adopted RCW 48.18.190 which provides:

“Policy must contain entire contract. No agreement in conflict with, modifying, or extending any contract of insurance shall be valid unless in writing and made a part of the policy.”

In *National Indemnity Co. v. Smith Gandy, Inc.*, 50 Wn.2d 124, 309 P.2d 742 (1957), it was held that a letter confirming coverage was inadmissible. *Western Casualty & Surety Co. v. Harris Petroleum Co.*, U.S.D.C. S.D., California, Central Div. (1963), 220 F. Supp. 952, applied such principle to correspondence and previous policies.

Likewise, the policy (Tr. 14; Ex. “A”) provides:

“16. *Changes.* Notice to any agent or knowledge possessed by an agent or any other person shall not effect a waiver or a change in any part of this policy or estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement

issued to form a part of this policy, signed by an executive officer of the company."

"19. *Declarations*. By acceptance of this policy the named insured agrees . . . that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance."

*Miller v. Penn Mutual Life Insurance Co.*, 189 Wash. 269, 64 P.2d 1050 (approved in *Kane v. Order of United Commercial Travelers*, 3 Wn.2d 335, 100 P.2d 1036 (1940)), stated:

"It is well settled that all parts of an insurance policy must, if possible, be harmonized and given effect (citation).

"The liability of respondent [insurer] is fixed by the terms of the contract, and its terms, if plain and free from ambiguity, must control (citation).

"In thus construing the policy we are not unmindful of the rule that policies are construed in favor of the insured and most strongly against the insurer, as held in *Starr v. Aetna Life Insurance Co.*, *supra*, but this rule should not be permitted to have the effect to make a plain agreement ambiguous and then interpret it in favor of an insured (citation)."

It is submitted that in the instant case, the appellee, rather than relying on the plain language of the policy as understood by Mr. Walls—that Endorsement 23 did not affect Exclusion (f)—sought to create an ambiguity by its own suggested endorsement in order to obtain favorable interpretation.

Under the statute and cases cited it is clear that Exhibits "I" and "J" should not have been admitted in evidence and that none of Mr. Walls' testimony concern-

ing conversations leading up to the policy and endorsements should have been admitted. Under the circumstances and particularly the failure of substantial evidence to support the findings of fact, appellant should be entitled to reversal and dismissal.

**3. The parol evidence, assuming it admissible in evidence, received over appellant's objection, does not support the judgment.**

The most that may be said for appellee's parol evidence is that it shows that:

1. Appellee wanted its insurance package placed through three different brokers (St. 73).

2. Because of lower premium appellee placed coverage with appellant through Robert O. Fleming, broker (St. 75).

3. Appellee wanted an endorsement on its policy with appellant the same as it had with Glenns Falls Insurance Company, its prior insurer (Exhibit "I," Exclusion (1) Endorsement 23, Exhibit "A," Tr. 23, St. 76).

4. Appellant complied and issued Endorsement 23 after receiving appellee's letter to Fleming (Exhibit "I" and accompanying endorsement and Exhibit "J," Item 8).

5. Endorsement 23 did not affect Exclusion (f) (St. 109, 126).

6. Appellee's earlier Glenn's Falls policy had maximum limits of \$15,000.00 (Exhibit "L").

7. Endorsement 10 of Exhibit "A" (Tr. 21) provided



such coverage on a conditional basis, but appellee did not comply (Tr. 38, ¶ 31).

8. Appellant's limits of potential liability were \$500,000.00 each accident (Tr. 15, St. 103).

9. Glenn's Falls modified its care, custody and control exclusions by deleting Exclusion (j) and (k) thereof (Ex. L, St. 99, 101, 102), although appellant would not do so without additional premium (St. 117) and, to Mr. Walls' knowledge, Exclusion (f) never was deleted (St. 117).

### CONCLUSION

Appellant submits that the facts admitted by appellee in the pre-trial order clearly establish the dock as property excluded under Exclusion (f) of Exhibit "A." The parol evidence erroneously received only tended to support appellant's position that, in view of the potential hazard—one-half million dollars and gasoline unloading operations—it would not modify Exclusion (f) without additional premium. Accordingly, if the dock was, at the time of loss, property as described in Exclusion (f), the Judgment must be reversed.

Appellee has never seriously suggested that it was not "occupying" and "using" the dock at the time of the loss. Rather, it has only suggested that others also might have used the dock at other times—and the Court so found in the term "non-exclusive." But this adjective is not in the policy, and it ought not now be interlined by the judiciary under the guise of interpretation.



The judgment should be reversed with instructions to dismiss or at least a new trial granted with instructions to consider only the facts surrounding the loss with reference to Exhibit "A."

Respectfully submitted,

WALSH & MARGOLIS

By ROBERT J. HALL

*Attorneys for Appellants*

### CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with these rules.

ROBERT J. HALL

*Attorney for Appellant*

## APPENDIX

Table of Exhibits

<i>Exhibit No.</i>	<i>Description</i>	<i>Identified</i>	<i>Offered and Received</i>
A	Insurance Policy	Tr. 50	St. 8
B	Diagram of the dock	Tr. 50	St. 8
C	Lease dated Nov. 1, 1941	Tr. 50	St. 8
D	Lease dated July 6, 1945	Tr. 50	St. 8
E	Lease dated March 5, 1952	Tr. 50	St. 8
F	Lease dated March 1, 1953	Tr. 50	St. 8
G	Diagram of oil dock	Tr. 51	St. 8
H	Group of five photographs	Tr. 51	St. 8
I	Letter dated July 14, 1958, from Robert O. Fleming & Co., Inc.	St. 9	St. 10
J	Memorandum to File From from Sam Soter	Tr. 51	St. 8
K	Letter dated February 26, 1965, from Port of Pasco	Tr. 51	St. 8
L	Glen's Falls Insurance Policy	Tr. 96	St. 96















